

PROCEEDINGS  
OF THE  
**American Society of International Law**  
AT ITS  
TWENTY-SIXTH ANNUAL MEETING  
HELD AT  
WASHINGTON, D. C.  
APRIL 28-30, 1932

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CONSTITUTION  
OF THE  
AMERICAN SOCIETY OF INTERNATIONAL LAW<sup>1</sup>  
(Revision of April 25, 1925.)

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ARTICLE I

*Name*

This Society shall be known as the American Society of International Law.

ARTICLE II

*Object*

The object of this Society is to foster the study of international law and promote the establishment of international relations on the basis of law and justice. For this purpose it will cooperate with other societies in this and other countries having the same object.

ARTICLE III

*Membership*

Members may be elected on the nomination of two members in regular standing by vote of the Executive Council under such rules and regulations as the Council may prescribe.

Each member shall pay annual dues of five dollars and shall thereupon become entitled to all the privileges of the Society, including a copy of the *American Journal of International Law* issued during the year. Upon failure to pay the dues for the period of one year a member may, in the discretion of the Executive Council, be suspended or dropped from the rolls of membership.

Upon payment of one hundred dollars any person otherwise entitled to membership may become a life-member and shall thereupon become entitled to all the privileges of membership during his life.

A limited number of persons not citizens of the United States and not exceeding one in any year, who shall have rendered distinguished service to the cause for which this Society is formed to promote, may be elected to honorary membership at any meeting of the Society on the recommendation

<sup>1</sup> The history of the origin and organization of the American Society of International Law can be found in the Proceedings of the First Annual Meeting at p. 23. The Constitution was adopted January 12, 1906.

of the Executive Council. Honorary members shall have all the privileges of membership, but shall be exempt from the payment of dues.

#### ARTICLE IV

##### *Officers*

The officers of the Society shall consist of a President, an Honorary President, three Vice-Presidents, such number of Honorary Vice-Presidents as may be fixed from time to time by the Executive Council, a Secretary,<sup>1</sup> and a Treasurer, all of whom shall be elected annually, and of an Executive Council composed of the foregoing officers, *ex officio*, and twenty-four elected members, whose terms of office shall be three years, except that of those elected at the first election, eight shall serve for the period of one year only and eight for the period of two years, and that any one elected to fill a vacancy shall serve only for the unexpired term of the member in whose place he is chosen. No elected member of the Executive Council shall be eligible for reelection until the next annual meeting after that at which his term of office expires.

The Secretary<sup>1</sup> and the Treasurer shall be elected by the Executive Council. The other officers of the Society shall be elected by the Society, except as hereinafter provided for the filling of vacancies occurring between elections.

At every annual election candidates for all offices to be filled by the Society at such election shall be placed in nomination by a Nominating Committee, which shall consist of the five members of the Society receiving the highest number of ballots cast by the members at the first session of the Annual Meeting of the Society. The Executive Council may submit a list of nominees.

All officers shall be elected by a majority vote of members present and voting.

All officers of the Society shall serve until their successors are chosen.

#### ARTICLE V

##### *Duties of Officers*

1. The President shall preside at all meetings of the Society and of the Executive Council and shall perform such other duties as the Council may assign to him. In the absence of the President at any meeting of the Society his duties shall devolve upon one of the Vice-Presidents to be designated by the Executive Council, or by vote of the Society.

2. The Secretary<sup>1</sup> shall keep the records and conduct the correspondence of the Society and of the Executive Council and shall perform such other duties as the Council may assign to him.

<sup>1</sup> As amended April 26, 1930.

3. The Treasurer shall receive and have the custody of the funds of the Society and shall disburse the same subject to the rules and under the direction of the Executive Council. The fiscal year shall begin on the first day of January.

4. The Executive Council shall have charge of the general interests of the Society, shall call regular and special meetings of the Society and arrange the programs therefor, shall appropriate money, shall appoint from among its members an Executive Committee and other committees and their chairman, with appropriate powers, and shall have full power to issue or arrange for the issue of a periodical or other publications, and in general possess the governing power in the Society, except as otherwise specifically provided in this Constitution. The Executive Council shall have the power to fill vacancies in its membership occasioned by death, resignation, failure to elect, or other cause, such appointees to hold office until the next annual election.

Nine members shall constitute a quorum of the Executive Council, and a majority vote of those in attendance shall control its decisions.

5. The Executive Committee shall have full power to act for the Executive Council when the Executive Council is not in session.

6. The Executive Council shall elect a Chairman, who shall preside at its meetings in the absence of the President, and who shall also be Chairman of the Executive Committee.

## ARTICLE VI

### *Meetings*

The Society shall meet annually at a time and place to be determined by the Executive Council for the election of officers and the transaction of such other business as the Council may determine.

Special meetings may be held at any time and place on the call of the Executive Council or at the written request of thirty members on the call of the Secretary. At least ten days' notice of such special meeting shall be given to each member of the Society by mail, specifying the object of the meeting, and no other business shall be considered at such meeting.

Twenty-five members shall constitute a quorum at all regular and special meetings of the Society and a majority vote of those present and voting shall control its decisions.

## ARTICLE VII

### *Resolutions*

All resolutions relating to the principles of international law or to international relations which shall be offered at any meeting of the Society shall, in the discretion of the presiding officer, or on the demand of three members,

be referred to the appropriate committee or the Council, and no vote shall be taken until a report shall have been made thereon.

#### ARTICLE VIII

##### *Amendments*

This Constitution may be amended at any annual meeting of the Society by a two-thirds vote of the members present and voting. Amendments to the Constitution may be proposed by the Council, or by a communication in writing signed by at least five members of the Society and deposited with the Secretary<sup>1</sup> within ten months after the previous annual meeting, and any amendments so deposited shall be reported upon by the Council at the succeeding annual meeting. All proposed amendments shall be submitted in writing to the members of the Society at least ten days before the meeting at which they are to be voted upon and no amendment shall be voted upon until the Council shall have made a report thereon to the Society.

<sup>1</sup> As amended April 26, 1930.



REGULATIONS OF THE EXECUTIVE COUNCIL REGARDING THE EDITING AND  
PUBLICATION OF THE AMERICAN JOURNAL OF INTERNATIONAL LAW

*Adopted May 22, 1924*

1. There shall be a Board of Editors charged with the general supervision of editing the *American Journal of International Law* and determining general matters of policy in relation thereto.

2. The Board shall be elected annually by the Executive Council.<sup>1</sup>

3. Membership upon the Board of Editors shall involve, in addition to the duties otherwise prescribed herein, obtaining articles and other material for publication, the preparation of contributions, especially editorial comments and book reviews, and the examination of and giving advice upon the suitability for publication of articles prepared by non-members of the Board. The minimum number of contributions which each Editor shall be called upon to contribute or obtain for publication in the *Journal* is to be determined by the Board.<sup>2</sup>

4. There may be an Honorary Editor-in-Chief elected by the Council; and there shall be an Editor-in-Chief and a Managing Editor to be elected annually from among the members of the Board by the Executive Council, and to serve until their successors assume office.

The Editor-in-Chief shall call and preside at all meetings of the Board of Editors, and when the Board is not in session he shall determine matters of policy regarding the contents of the *Journal*.

The Managing Editor shall have charge of the publication of the *Journal*, shall receive contributions and other material for publication, including books for review, and conduct the correspondence regarding the same.

In the event of the temporary inability of the Editor-in-Chief to serve, his duties shall be performed by the Managing Editor, unless the Editor-in-Chief shall designate an acting Editor-in-Chief.

5. The *Journal* shall be made up of leading articles, editorial comments, a chronicle of international events, a list of public documents relating to international law, judicial decisions involving questions of international law, book reviews and notes, a list of periodical literature relating to international law, and a supplement.

(a) Before publication all articles shall receive the approval of two members of the Board. In case an article is rejected by one editor, the question of its submission to another editor shall be decided by the Editor-in-Chief. Articles by members of the Board of Editors shall be submitted to the Editor-in-Chief, who shall decide as to their publication.

(b) Editorial comments must be written and signed by the members of the Board of Editors, and shall be published without submission to any other editor, except that they shall be governed by the provisions of Paragraph 6 hereof. Current notes of international events, containing no com-

<sup>1</sup> As amended April 24, 1926 and April 25, 1929.

<sup>2</sup> As amended April 25, 1929.

ment, may be printed over the signatures of non-members of the Board of Editors in the discretion of the Managing Editor.

(c) In the department of judicial decisions, preference in publication shall be given to the texts of decisions of international courts and arbitral awards which are not printed in a regular series of publications available for public distribution. This department may also contain the texts of decisions of the Supreme Court of the United States and the highest courts of other nations involving important questions of international law. Comments upon court decisions, either those printed in the *Journal*, or those not of sufficient importance to print textually, may be supplied by members of the Board of Editors, and shall be printed as editorial comments or current notes.

(d) The chronicle of international events, and the lists of public documents relating to international law and periodical literature of international law, shall be prepared under the direction of the Managing Editor.

(e) The supplement shall be made up of the texts of important treaties and other official documents. Material for it shall be supplied by the Managing Editor, taking into consideration such suggestions from the members of the Board as they may have to offer from time to time.

6. The final make-up of each number of the *Journal* shall be submitted by the Managing Editor to the Editor-in-Chief, who shall have the power to veto the publication of any contribution or other material. In the absence of such a veto, the Managing Editor shall be authorized to publish the *Journal*, using approved material so far as approval is prescribed herein.

7. The *Journal* shall be published upon the 15th days of January, April, July and October, or as near to those dates as possible, and the Managing Editor shall have power to proceed with the publication of the *Journal* from the materials in his hand upon the first day of the month preceding the month of publication.

8. The Managing Editor shall receive such compensation for his services, and such allowance for clerical assistance, as may be fixed by the Executive Council.

TWENTY-SIXTH ANNUAL MEETING  
OF THE  
AMERICAN SOCIETY OF INTERNATIONAL LAW

THE WILLARD HOTEL, WASHINGTON, D. C.  
APRIL 28-30, 1932

FIRST SESSION

Thursday, April 28, 1932, 8 o'clock p. m.

President JAMES BROWN SCOTT. Ladies and gentlemen, members of the Society: For the twenty-sixth time the American Society of International Law meets in annual convention. The program you have in your hand, from which you will see it is a rather heavily charged evening. The introductory remarks by the Secretary, Mr. George A. Finch, are now in order.

*To the President, the Executive Council, and the Members of the American Society of International Law:*

Instead of attempting to cover in summary form all the important international events bearing upon international law that have happened since the last meeting of the Society, I shall, this evening, confine myself to the happenings during the preceding year that have suggested the general topics for discussion upon the program of the present meeting.

One of these topics is the treaty situation in the Far East—referring of course to the developments of the last seven months in Manchuria.

MANCHURIA

It is said that the shots which were fired by the embattled farmers at Concord and Lexington on April 19, 1775, were heard around the world. It is problematical if or when their reverberations were heard in Manchuria; but certainly the repercussions of the explosion of a bomb on the tracks of the South Manchuria Railway near Mukden on September 18, 1931, immediately reached the United States and are still an important topic for discussion in many other parts of the world.

Before referring to the reasons for the worldwide interest in Manchuria, it might be well to mention a few facts in regard to this region. It has an area of nearly 400,000 square miles, lying between the 38th and 53rd degrees of north latitude. Its relation geographically to China is as that of New England and New York to the United States. Its soil is fertile and the climate favorable to agriculture. Sixty per cent. of the world's crop of soya beans is produced there. Its lumber, coal and iron industries are also im-

portant. In size, climate and natural resources, North Americans may compare Manchuria with the States of Iowa, Minnesota, North and South Dakota, in the United States, and the southern half of the Province of Manitoba, in Canada, the comparison being somewhat favorable to Manchuria, in the southern part of which fruit-growing is being developed. Manchuria has a population of between 25 and 30 million, of whom over ninety per cent. are Chinese, and it is estimated that the country is capable of supporting 100 million inhabitants.

It may be of interest to state why this large area, richly endowed by nature, has remained sparsely settled so long, although it lies next to the most thickly peopled and hungry country on earth—China—and has been preserved as a prize to be contended for in the 20th century by two other expanding empires—Russia and Japan.

Manchuria lies beyond the Great Wall erected years ago by the Chinese for protection against the invading tribes on the north. It was from Manchuria that the last conquerors of China emerged to place their dynasty upon the throne of China, where it remained for almost 300 years, from 1644 until 1911. During that long period, the Manchu governors of China regarded Manchuria as their exclusive patrimony, and discouraged Chinese settlement there. When the Manchus were overthrown in 1911 the succeeding Chinese Government removed these Manchu restrictions and since then there has been witnessed one of the greatest migrations in modern history, the number of annual Chinese immigrants into Manchuria reaching a million a few years ago.

Although Manchuria may be said not to have been originally a part of China proper, China's sovereignty over the provinces may now be attributed to the absorption of her conquerors. A recent Chinese writer says:

... the Manchus have been entirely assimilated into Chinese culture. The few Manchu remnants have long abandoned the Manchurian language. The Chinese and Manchus now speak one dialect. In language, customs, traditions, and sentiments, Manchuria and China are one. In the social and political thinking of the Chinese people today, there is absolutely no distinction between a Manchu and a Chinese. In adopting the Chinese culture and through inter-marriage, the Manchus have united voluntarily with the Chinese race.<sup>1</sup>

Should any of my fellow-members in the Society be disposed to question the validity of territorial sovereignty acquired by this kind of absorption, I hasten to assure them that any flaw in China's legal title to Manchuria would seem to have been removed by the voluntary submission to the Chinese Nationalist Régime of the hereditary war lord of Manchuria, whose government has recently been driven from the country by the military forces of Japan.

For the purposes of our discussion, the history of the events leading up

<sup>1</sup> Meng, *China Speaks*, p. 5.

to the explosion of September 18th last may be said to have started with the war between Japan and China over Korea in 1894. In the peace treaty of April 17, 1895, the southern part of Manchuria was ceded to Japan in perpetuity,<sup>2</sup> but, owing to the intervention of Russia, Germany and France, Japan was obliged to retrocede the territory to China on November 8, 1895.<sup>3</sup> Three years later the territory was leased to Russia for 25 years,<sup>4</sup> and this was one of the causes which brought on the Russo-Japanese War of 1904-1905. The peace treaty which ended that war transferred to Japan Russia's leasehold rights in southern Manchuria,<sup>5</sup> thus making at least partial satisfaction to Japan for what she has always regarded as the robbery of the fruits of her victory over China in 1895.

Whatever justification Japan may feel in the recovery of the territory she retroceded to China under pressure of the intervening Powers in 1895, her record title at present in Manchuria is derived through the cession from Russia by the Treaty of Portsmouth, which was formally concurred in by China in the Treaty of Peking, signed December 22, 1905.<sup>6</sup> According to these documents, the lease of the territory in Manchuria was to expire in 1923, and China had the right to purchase in 1938 the South Manchuria Railway, originally built by Russia under its lease; but the operation of these leasehold provisions was interrupted by the so-called 21 demands of Japan upon China in 1915. By China's agreement to some of these demands, the lease on the territory was extended to 1997, and on the Railway, to 2002, and an extension thereof into Korea, to 2007.<sup>7</sup>

A word as to the importance of the railway, which is the central figure in the controversy. The South Manchuria Railway is a semi-official corporation organized by the Japanese Government to improve and operate the railways ceded to Japan by Russia with the approval of China. Its actual character is thus described by a reliably informed Japanese journalist:

... the South Manchuria Railway Company is much more than a railway company. Although transportation is its main enterprise, the company operates coal mines, iron works, locomotive works, wharves, and warehouses on a large scale; maintains schools and hospitals; promotes public hygiene and undertakes various public works for the well-being of both the Chinese and Japanese within the railway zone. Besides, it controls a number of joint-stock companies, electric and gas works, shipping and dockyard companies, as well as a chain of modern hotels for the comfort of travelers in South Manchuria. In point of volume of business transacted and of scope of functions performed, the South Manchuria Railway Company stands without a peer in the Orient and perhaps in the entire Pacific regions.<sup>8</sup>

The present troubles in Manchuria are the direct result of the extension of Japan's tenure as part of the 21 demands in 1915. The Chinese National-

<sup>2</sup> Am. Jour. Int. Law, Supplement, Vol. 1 (1907), p. 378.

<sup>3</sup> *Ibid.*, p. 384.

<sup>4</sup> *Ibid.*, Vol. 4 (1910), pp. 289, 291.

<sup>5</sup> *Ibid.*, Vol. 1 (1907), p. 17.

<sup>6</sup> *Ibid.*, Vol. 4 (1910), p. 307.

<sup>7</sup> *Ibid.*, Vol. 10 (1916), pp. 1-18.

<sup>8</sup> Kawakami, Japan Speaks, pp. 51-52.

ist Government does not recognize the validity of the extension, claiming it is vitiated by duress. Japan's complaints against China's non-coöperation and active resistance in Manchuria may be traced to China's determination not to recognize the binding effect of the agreements concluded under pressure in 1915, and to hold unlawful Japan's occupation of Manchuria, and operation of the railway and its appurtenant rights beyond the terms of the original Russian leases. The present Prime Minister of Japan has publicly stated over his signature that "Since the beginning of the intervention we have concluded no new treaties, nor have we secured any new concession. All that we seek is the enforcement of the old agreements which have wilfully been disregarded either by the Nationalists or by the old Manchurian régime, or by both."<sup>9</sup>

There are a number of other agreements and questions in dispute, but they are subsidiary to the main ones I have mentioned.

The underlying interest which has impelled Japan to insist to the point of war on the validity of her treaties and agreements with China, has been well stated by an American traveler recently returned from the Far East. He says:

Japan's population has been increasing at the rate of nearly a million a year, and unless something happens to retard this rate of growth, relief must come either by emigration or by much more extensive industrial development as the basis of a foreign trade enabling her to import the necessities of life. Both Japanese and foreign economists agree that even if unrestricted opportunities for emigration were open, they would hardly take care of more than ten per cent of the annual increment of population. This percentage would undoubtedly be much larger if Korea and Manchuria were available as fields of extensive colonization; but as a matter of fact, the Japanese will not go in significant numbers to the mainland, partly because of the rigor of the climate, and partly because the much lower standard of living of the Koreans and Chinese makes it practically impossible for Japanese farmers and petty tradesmen to compete with the native population. A dependable source of agricultural and mineral products and expanding trade therefore offer the only way of providing a living for a rapidly growing population. It is possible, indeed not unlikely, that owing to the rise in the standard of living Japan will before long experience a tendency toward a greatly reduced rate of increase in population, if not indeed a stationary position in this regard. But this is more a matter of prophecy than of reality, and it does not modify the universal belief of the Japanese people that Manchuria as a source of food and raw materials and as a field for industrial and commercial development is an absolute necessity to the country. They urge this, however, not as an excuse for conquest, which they consistently disavow as a motive, but as a reasonable ground for demanding from those who actually govern Manchuria coöperation in these reasonable objectives of national policy, rather than constant obstruction and frustration of that policy.<sup>10</sup>

<sup>9</sup> Kawakami, pp. x-xi.

<sup>10</sup> Address of Jerome D. Greene before the World Affairs Institute, New York, March 23, 1932.



On the other hand, it appears that China is equally vitally interested in retaining an unobstructed control of Manchuria. The present Chinese Minister to the United States has this to say on that subject:

Economically, Manchuria is destined to play a very important rôle in the industrial development of China. Manchuria contains some of the best coal fields. China is not at all well supplied with iron and Manchuria has the largest iron deposit. With its growing population, China has to import annually large amounts of foodstuffs; Manchuria with its rich soil is looked upon as the granary for China's millions. China, no less than Japan, is faced with the problem of surplus population, especially in the provinces along the coast. Exclusion laws operate against Chinese emigrants even harder than they do against Japanese. Hence, enormous numbers of immigrants have yearly poured into the Three Eastern Provinces during the last decade. These are elemental economic problems that are facing the Chinese people, which no thinking people can ignore.

Strategically, Manchuria is absolutely vital to China's security. Chinese history has taught that China's security depends upon an adequate defense of its northern boundary. During the last thousand years, China has witnessed two invasions, each of which led to a domination of China for several hundred years. Both of them came from beyond the Great Wall. The fact is that whoever holds South Manchuria is the master of North China. Strategically, South Manchuria commands a dominating position over the great plains of Central Asia, and it is well-nigh impossible to defend these plains against powerful attacks from the northeast.<sup>11</sup>

Aside from these considerations relating to the merits of the controversy over Manchuria, both China and Japan are signatories of the Pact of Paris renouncing war as an instrument of national policy and agreeing to settle by pacific means all disputes or conflicts of whatever nature or of whatever origin which may arise between them. The United States and practically all the other nations of the world are also parties to this pact. Furthermore, China and Japan are parties with the United States, Belgium, the British Empire, France, Italy, The Netherlands, and Portugal to the Treaty of Washington signed February 6, 1922, relating to principles and policies to be followed in matters concerning China. The preamble of this treaty states that the signatories desire "to adopt a policy designed to stabilize conditions in the Far East, to safeguard the rights and interests of China, and to promote intercourse between China and the other Powers upon the basis of equality of opportunity." Article I of the treaty, among other things, obligates the contracting Powers "to respect the sovereignty, the independence, and the territorial and administrative integrity of China." Other provisions of the Nine-Power Treaty are designed to make effective the general purposes of the treaty as stated in the preamble.

Moreover, China and Japan are members of the League of Nations,

<sup>11</sup> Meng, *China Speaks*, p. vi.

but, inasmuch as the United States is not bound by the terms of the Covenant of the League, I shall refrain from mentioning them.

#### INTERNATIONAL LOANS

Obligations of foreign governments or their political subdivisions totalling billions of dollars have been sold in the United States during the last ten or twelve years, and defaults in the payment of interest are now occurring. The failure or inability of a government to live up to its financial obligations to citizens of another government usually leads to complications in the international relations of the creditor and debtor nations. A few days ago the State Department announced a conference of officials to study the problem of the interests of American investors in foreign countries.

While in principle the lending of money by private citizens to foreign governments may not be different from other contracts between the same parties in which the government of the private contractor has no concern, except in case of a request for diplomatic protection against an injury or injustice done by the foreign government to its citizen, there is a great practical difference due to the serious ill effects that large loans especially may have upon the people of both countries involved. Loss of income or the money invested in foreign government loans may not only seriously affect the fortunes of private citizens, but such securities on account of their character become a part of the assets of the lending country's banks, they are selected as investments by trustees for various fiduciary purposes, they become parts of the endowments of educational and public welfare institutions, and are bought by life insurance companies. On the other hand, the purposes and the terms of the loan, the revenues pledged for its security, and the safeguards adopted for the proper expenditure of the proceeds are all of vital interest to the people of the borrowing country, who must from their taxes pay all the costs and expenses of the loan and meet the interest and amortization charges sometimes over a long period of years. A recognized American authority on international finance has stated:

The development of a country will to no small extent depend upon the wisdom with which foreign loans are floated and the purposes for which they are used. The statement that "a public debt is a public blessing" is by no means always true, and the unwisely contracted public debts of many countries are evidences of the fact that a public debt often proves to be a public curse. Whether or not a public debt is to prove a curse or a blessing will depend upon the wisdom with which it is contracted and upon the purposes for which its proceeds are expended.

This same authority continues:

The purposes for which a public debt may be wisely contracted are limited. Borrowing to meet deficits in the annual budget is something that can be justified under extraordinary circumstances, such as war, a public calamity, or some unavoidable event which temporarily causes



a deficit in the Government's finances. As a general principle, however, the present should pay the expenses of the present and not burden the future with debts contracted to pay for the expenses of today. . . .

Even for those who admit the validity of this principle, there is always a temptation to enlarge unduly the field of loan operations. When additional funds are desired, borrowing is usually a line of less political resistance than increased taxation. For a country in [an early] state of economic development, a public debt contracted for a purpose that does not directly or indirectly yield a revenue out of which the service of the loan may be met, is, except in the case of a limited number of loans urgently needed for such purposes as sanitation and public health, to be considered as a luxury to be indulged in very sparingly. The purchase of equipment for the army and navy, the widening of city streets, and the construction of public parks may represent highly desirable public expenditures, and yet under ordinary conditions may not warrant the pledging of the nation's credit for many years to come to pay for them.<sup>12</sup>

In countries subject to sudden changes of government, because of political dissensions or adverse economic conditions, there is a tendency on the part of the succeeding government to question not only the judgment of its predecessors in office, but the legality of their action, in burdening the state with foreign debts, not to mention charges of dishonesty or corruption in the use of the borrowed money.

The effects of international loan transactions may, therefore, become of great public interest in national affairs as well as in international relations. The amount of the loss that the people of the lending country sustain, or the weight of an allegedly unjust burden borne by the people of the borrowing country, may well be the measure of the ill will engendered between them by an unsound or unwise international loan.

The seriousness of this kind of business has been recognized by those responsible for the conduct of the foreign affairs of the United States. Ten years ago, on March 3, 1922, the Department of State issued a public notice calling attention to the increasing importance of the flotation of foreign loans in the American market, and the desire of the government to be duly and adequately informed regarding such transactions before their consummation. This statement was published following a conference between the President of the United States, certain members of his Cabinet, and a number of American investment bankers. The government, of course, has no authority of law to interfere with the private business of American citizens. This was made clear in the concluding paragraph of the statement just referred to, which read:

The Department of State can not, of course, require American bankers to consult it. It will not pass upon the merits of foreign loans

<sup>12</sup> Report on the Public Debt Policy of Chile, by Edwin W. Kemmerer, Research Professor in International Finance, Princeton University, in Hearings before Senate Committee on Finance, Jan. 12, 1932, p. 1696.

as business propositions, nor assume any responsibility whatever in connection with loan transactions. Offers for foreign loans should not, therefore, state or imply that they are contingent upon an expression from the Department of State regarding them, nor should any prospectus or contract refer to the attitude of this Government. The Department believes that in view of the possible national interests involved it should have the opportunity of saying to the underwriters concerned, should it appear advisable to do so, that there is or is not objection to any particular issue.<sup>13</sup>

The only penalty a banker might incur for ignoring the suggestions of the Department might be its subsequent refusal to grant diplomatic protection to the loan in case the need arose, but by that time the banker who floated the loan would probably have ceased to have any financial interest in it.

In one aspect of this subject at least great progress must be recognized in the development of international law during the last thirty years. As late as 1902 the rule of the Roman law, *caveat venditor*—let the seller beware, publicly affirmed by Lord Palmerston in 1848 in asserting the right of England to make war on Spain because of its suspension of payment of interest on the national foreign debt,<sup>14</sup> was put into actual practice in the blockade of Venezuela by several European Powers to enforce, among other things, payment on the Venezuelan national debt. This action brought forth the note of December 29, 1902, of Dr. Luis M. Drago, Minister of Foreign Affairs of the Argentine Republic, addressed to the Government of the United States, questioning the legality under international law of the forcible collection of public debts.<sup>15</sup> The Drago proposal met with a sympathetic reception in the United States. In an address at Buenos Aires in 1906 Secretary of State Elihu Root asserted:

. . . The United States of America has never deemed it to be suitable that she should use her army and navy for the collection of ordinary contract debts of foreign governments to her citizens. For more than a century the State Department has refused to take such action, and that has become the settled policy of our country. We deem it to be inconsistent with that respect for the sovereignty of weaker powers which is essential to their protection against the aggression of the strong. We deem the use of force for the collection of ordinary contract debts to be an invitation to abuses, in their necessary results far worse, far more baleful to humanity than that the debts contracted by any nation should go unpaid. We consider that the use of the army and navy of a great power to compel a weaker power to answer to a contract with a private individual, is both an invitation to speculation upon the necessities of weak and struggling countries and an infringement upon

<sup>13</sup> Department of State press release, March 3, 1922.

<sup>14</sup> Moore, *International Law Digest*, Vol. VI, pp. 285-286.

<sup>15</sup> *AM. JOUR. INT. LAW*, Supplement, Vol. 1 (1907), p. 1. See also Dr. Drago's article in the *JOURNAL*, Vol. 1 (1907), p. 692 ff.

the sovereignty of those countries, and we are now, as we always have been, opposed to it.<sup>16</sup>

Mr. Root's belief, expressed on the same occasion, that "perhaps not today nor tomorrow, but through the slow and certain process of the future, the world will come to the same opinion" was confirmed sooner than he anticipated, for, in the following year, the Second Peace Conference at The Hague adopted a convention which provided that "The contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the government of one country by the government of another country as being due to its nationals." This undertaking was limited by the stipulation that it should not be "applicable when the debtor state refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any *compromis* from being agreed on, or, after the arbitration, fails to submit to the award."<sup>17</sup> It is believed that this convention embodies not only the accepted international law but the common sense of the present time.

The renunciation of force for the recovery of public contract debts contained in the Hague Convention does not, however, settle the difficulty between the foreign creditor and the sovereign debtor when default takes place, nor suggest the terms of reference to arbitration. In the absence of direct settlement between the parties, the solution must be reached through the processes of diplomacy under the rules of international law applicable to the diplomatic protection of citizens abroad.

Considering the conditions under which a contract is finally made between the private purchaser of the bond and the foreign issuing government, it would seem too legalistic to dismiss the former's rights in case of default by simply applying the rule of the common law *caveat emptor*—let the purchaser of the foreign bond beware. For one thing, the distance which separates the buyer and the seller negatives the theory that they are dealing over the counter or at arms' length. Then there is the intervention of a third party, the international banker, who floats the loan, whose precise relationship to the other two parties to the transaction is not always sufficiently clear to fix legal responsibility upon the other parties for his acts and representations.

Between the two extremes—the right formerly asserted by the government of the bondholder to exact payment in full measure from the debtor government by force if necessary, and the complete assumption of all risks of the investment by the private purchaser, lie *lacunae* in the law the filling up of which should provide interesting work for the international lawyer.

#### INTERNATIONAL LAW OF AIR NAVIGATION

The limited time at my disposal, and the nature of the subject, do not allow me to make any extended reference to the third subject of general

<sup>16</sup> Root, *Latin America and the United States*, p. 98.

<sup>17</sup> Scott, *The Hague Conventions of 1899 and 1907*, p. 89.

discussion on our program. Its title is self-explanatory—International Law of Air Navigation. I shall conclude by remarking that the consideration of this subject will be under the direction and leadership of one high in the counsels of the Society, as well as in authority in the science of international law.

Respectfully submitted,

GEORGE A. FINCH,  
*Secretary*

The PRESIDENT. I shall now ask your attention to some observations upon

### A SINGLE STANDARD OF MORALITY FOR THE INDIVIDUAL AND THE STATE

By JAMES BROWN SCOTT  
*President of the Society*

One of the triumphs of modern times, in the opinion of certain masters of our modern jurisprudence, is the liberation of law from theology,—without, I hasten to say, disrespect for either—the theory being that theology is one thing and law another thing and, as the law of the state should not affect the church, so neither the church nor its theology should affect law. The result has been to make of law a lay subject. No doubt this is as it should be.

This separation does not mean that there may not be a moral law and a system of morals; but unfortunately it does seem to imply that the moral law is the law of the church and not of the state, and that the law with which we are concerned in the relations of individuals is the law of the state and not of the church. The trouble seems to have been that by the union of church and state, the church became political, without the state becoming moral. The law of the layman is what we may call a six day law; the moral law is too often of the seventh day alone.

We thus have two standards: the law of the state, constituting a rule of conduct for individuals as members of the group which we call the state; and a law of moral conduct which may be called the moral rule, or which I would prefer to call the right rule. A statute of the state is civil law, although it may be opposed to the moral law, which recognizes no temporal boundaries.

This analysis, true enough in itself, may nevertheless seem to be unfair, or not wholly fair to the masters of jurisprudence, who might well reply that they do not wish a law to be unmoral,—much less immoral; that their contention is not that law should be freed from the standard of the church but that it should not bear the marks of what we often hear spoken of as clerical

influence. In other words, the argument runs, the law should be of the people, as such, and not dictated or controlled by the advance guard of the clergy, acting in their own behalf.

We may admit that law should be moral without being clerical, but the opposition is rather between doctors of jurisprudence and the so-called "clerical party,"—not the church.

I am about to tax your patience by what may appear to be a digression. It is; but you will, I hope, agree with me when I return to the subject of the paper, that it is what might be called a relevant digression, the purpose being to show that the artificial person which we call a corporation is conceived to have a separate legal entity, distinct from the natural persons composing it. The fallacy of this is seen when the outer covering is removed and we look beneath the surface, finding nothing but an aggregation of natural persons, united for a single purpose. In the ecclesiastical corporation, the persons are not concealed and their existence is recognized by the corporation, which itself exists solely to the end that each of its members may be a moral person in the sense of the New Testament. In a corporation organized for profit, however, the natural persons composing it are hidden beneath the surface, to be merged in a fictitious personality, so that it is considered in some mysterious way to have an entity separate and distinct from the shareholders to the extent of having a personality of its own, a citizenship of its own and rights and duties of its own. And the same fiction is applied, with even more far-reaching consequences, in the case of the political corporation called the state.

The case of the *Daimler Co., Ltd., v. Continental Tyre and Rubber Co. (Great Britain), Ltd.*, is as applicable to that political corporation which we call the state as it is to a commercial corporation for profit. Therefore, the facts of the case are stated in order that the principle involved may be applied to the one as well as to the other.

It appears that an action was begun in the name of the Continental Tyre and Rubber Company for a sum of money amounting to 5,605£, 16 s., to recover principal and interest and notarial charges on three bills of exchange drawn by the plaintiff company and accepted by the Daimler Company in payment for goods purchased some time prior to the outbreak of the World War. In accordance with British procedure, a summons was "taken out" by the Continental Company for a judgment against the Daimler Company. The Daimler Company opposed the summons on the ground that the Continental Company (as plaintiff) and its officers were alien enemies and, as such, incapable of bringing suit; and that therefore, in its opinion, the Daimler Company, in paying such amount, would be violating the provisions of the Trading with the Enemy Act of 1914.

To prove the enemy character of the Continental Company, it was necessary to open the books of the corporation, in order to ascertain whether the stockholders were subjects of Great Britain or alien enemies. As the

case depends upon the law to be applied to the facts when found, I quote from the reporter's statement of the case.

The respondent company was incorporated [in England] under the Companies Acts on March 29, 1905, with a capital of 10,000£., subsequently increased to 25,000£., in fully paid 1£. shares, and had its registered offices in London. It was formed for the purpose of selling in the United Kingdom motor car tyres made in Germany by a company incorporated in that country under German law. At the date of the writ the German company held 23,398 shares in the respondent company, and the remaining shares, except one, were held by subjects of the German Empire. The one share was registered in the name of Mr. Wolter, the secretary of the company, who was born in Germany, but resided in this country and in 1910 became a naturalized subject of the Crown. All the directors were subjects of the German Empire, and three of the four directors were resident in Germany when war was declared; the fourth, who had previously resided in England, left this country for Germany on the outbreak of the war.<sup>1</sup>

The order was issued. It was affirmed in Chambers and later by the Court of Appeal, consisting of Lord Chief Justice Reading, the Master of the Rolls, Lord Cozens-Hardy, and three Lords Justices, Kennedy, Phillimore and Pickford, with Justice Buckley dissenting. The opinion of the court, delivered by its presiding officer, was to the effect that the Tyre and Rubber Company was an artificial person,—a separate legal entity; and because it was incorporated in England, it was at the time of its incorporation a British company and so remained after the outbreak of the war with Germany, although all its shareholders and directors resided in Germany, each of whom, in his individual capacity, became at the outbreak of the war—and so remained until the cessation of hostilities—an enemy alien.

An appeal was taken by the Daimler Company to the House of Lords, where the case was learnedly and elaborately argued before the Earl of Halsbury,—who had been for many years Lord Chancellor—Viscount Mersey,—well known as an admiralty lawyer—Lord Kinnear, Lord Atkinson, Lord Shaw of Dunfermline, Lord Parker of Waddington, Lord Sumner and Lord Parmoor. The opinion of Lord Parker of Waddington must have impressed his colleagues, because those in favor of reversal of the judgment, with the exception of Lord Halsbury, agreed with the reasons which his Lordship expressed. We are not only dealing with a great master of equity; we are dealing with a judge who had familiarized himself with the principles of international law,—the principle of the thing in any just system being more than the law itself or the judge making the law—of which he became during his time the great judicial expositor. In the sphere of international law his name is bracketed with the names of Lord Stowell, Sir William Grant and Lord Kingsdown, and among judges he admittedly stands with the greatest of the English-speaking world. A judge who had decided the

<sup>1</sup> [1916] 2 A. C. 307, 309.



*Roumanian and Zamora* cases was more than competent to consider the international phase of the question involved in the *Daimler* case; and the decision, therefore, has an importance transcending the facts of the case, the principle which he discovered being applicable to any artificial person of limited liability created for profit or to a state, with unlimited liability, created for the happiness and well-being of the inhabitants.

There are passages here and there in the opinion of the court which have a present bearing upon the larger artificial person to which they are to be applied, and therefore Lord Parker will not merely be permitted but required, as it were, to speak in his own behalf.

"The principle upon which the judgment under appeal proceeds is that trading with an incorporated company cannot be trading with an enemy where the company is registered in England under the Companies Acts and carries on its business here." In the court below it was called an "English company" and likened, as Lord Parker says, "to a natural-born Englishman," the court below being of opinion that "payment" to the company in question "cannot be trading with the enemy, be its corporators who they may."<sup>2</sup> Admitting that the company is a person and that its acts therefore bound its members, Lord Parker, as a first step toward his conclusion, insists that the character of its corporators can not be irrelevant to the character of the company; for does not the rule against trading with the enemy depend on enemy character?

His Lordship considers the various ways in which a natural person acquires an enemy character and then inquires how the rules applicable to a natural person are to be applied to the artificial person. In the first place, the artificial person should not be put in a better position than a natural person. The nationality or residence of a company is at best a figure of speech. It must correspond, he says, to the birthplace and country of natural allegiance in the case of a living person. In accordance with the judgment from which an appeal was taken, the question of nationality would seem to have been settled: that the corporation, if organized in England, could not, as such, have enemy character.

Lord Parker finds an acceptable substitute "in control, an idea which, if not very familiar in law, is of capital importance . . ."<sup>3</sup> It may consistently with this view be admitted that "the acts of a company's organs, its directors, managers, secretary, and so forth, functioning within the scope of their authority, are the company's acts and may invest it definitively with enemy character." But this is not enough for his Lordship. There is something beyond the corporation which counts. It is that "the character of those who can make and unmake those officers, dictate their conduct mediately or immediately, prescribe their duties and call them to account, may also be material in a question of the enemy character of the company." If this were not so, "the personalities of the natural persons, who are its

<sup>2</sup> [1916] 2 A. C. 337-8.

<sup>3</sup> *Ibid.*, 340.

corporators, are to be ignored.”<sup>4</sup> The corporators, however, should not be—indeed they can not be—ignored. But the “qualities of enmity and amity, which are dependent on the chances of peace or war and are attributable only to human beings, . . . in cases where the active conduct of the company’s officers has not already decided the matter,” are to be derived from “the predominant character of its shareholders and corporators.”<sup>5</sup>

The question before the board—to use their Lordship’s expression—had occurred theretofore, in Lord Parker’s view, once—and only once—in the argument in the case of *Bank of United States v. Deveaux*, decided in 1809 by the Supreme Court of the United States,<sup>6</sup>—the opinion being by Chief Justice Marshall—and “the suggestion,” Lord Parker continues, “cannot have shocked that great jurist, and his actual decision proceeds upon the assumption that for certain purposes a court must look behind the artificial persona—the corporation—and take account of and be guided by the personalities of the natural persons, the corporators.”<sup>7</sup>

His Lordship then cites another American case (to which reference had been made in the opinion of the court below in the *Daimler* case). This was the leading case of *St. Louis and San Francisco Ry. Co. v. James*, decided by the Supreme Court of the United States in 1896, in which, his Lordship says, “the matter was at last set at rest,” in that the “Federal Courts did not ignore the existence of the corporators and fix their attention on the place where the corporation was chartered, or the State under whose laws it was registered.”<sup>8</sup>

From these two cases his Lordship concluded that “great judges [meaning the judges of our own Supreme Court], trained in the principles of the English common law, have not found it contrary to principle to look, at least for some purposes, behind the corporation and consider the quality of its members.”<sup>9</sup>

Companies such as that before their Lordships were of recent development,—indeed they had come into being since Great Britain’s last participation in a great foreign war—and therefore the importance in the international world of the individual, as distinct from the company, had not arisen as it did in the present case. The whole question—international as well as national—was therefore before the court, and it was to be decided upon the basis of facts rather than of legal precedents.

The fiction involved in companies incorporated for profit is being replaced by reality. Law is being replaced by equity. The common mother of the English-speaking commonwealths has, after much reflection and with no little hesitation, repudiated the monstrous doctrine that a company formed by human beings is an artificial person, separate and distinct from its stockholders, and the principle applies equally in the case of the members of a body politic or state, or of human beings organized for a lesser purpose.

<sup>4</sup> [1916] 2 A. C. 340.

<sup>5</sup> *Ibid.*, 341.

<sup>6</sup> 5 Cranch, 61, 81.

<sup>7</sup> [1916] 2 A. C. 341.

<sup>8</sup> *Ibid.*, 342.

<sup>9</sup> *Ibid.*



According to the *Daimler* case, stockholders could not grant to a company of their creation rights which they did not possess; and the judges decided that the courts could go behind the company and deal with the stockholders themselves, whenever necessary. The "Tyre" case was not an offhand decision. It had made its way from the lowest to the highest Court of Appeal, where the decision on the point of law arising from the facts then involved was that of a majority only of the judges.

Three years later their lordships had before them the case of the *Hamborn*.<sup>10</sup> The facts were complicated and it was necessary to decide the nationality of the vessel, which was held to be the property of a German company, although duly registered in Holland.

The steamship *Hamborn*, owned by a company incorporated in a neutral country whose flag the ship flew, was captured October 27, 1915, on a voyage from New York. It was condemned by Sir Samuel Evans, President of the Admiralty Division, and justly distinguished in the law of prize, on the ground that it was a German vessel, belonging to German owners, and therefore enemy property. The appellants contended that they were a limited liability company, incorporated in Holland according to Dutch law, and therefore entitled to fly the Dutch flag. Sir Samuel Evans, however, although he looked upon the *Hamborn* as being "nominally" owned by a Dutch company, held that the vessel "must be regarded as belonging to German subjects."

It was admitted that the vessel was owned by the Hamborn Steamship Company, organized in accordance with the laws of the Netherlands and registered as a Dutch vessel, also in accordance with the law of the Netherlands; but the fact was that the Netherlands company was in effect—if not in form—the property of German companies duly organized according to the law of Germany. "If the case turned on her user *de facto* at the time of capture,"—to quote the language of Lord Sumner, who had concurred in Lord Parker's decision in the *Daimler* case—"it would be simple: so it would be, if her owners were natural persons of neutral nationality *de jure*, neither adhering to the enemy nor allowing their chattel to be used in enemy service."<sup>11</sup> His Lordship rightly said that the case was "more complex"—indeed too complex for our purposes. It is only invoked to show that the doctrine proclaimed in 1916 by a majority of the court in the *Daimler* case was to be accepted unanimously and applied to the *Hamborn*. "The criteria for deciding enemy character in the case of an artificial person"—his Lordship continued—"differ from those applicable to a natural person, since in the nature of things conduct, which is one of the most important matters, can in the former case only be the conduct of those who act for or in the name of the artificial person."<sup>12</sup> His Lordship then referred to the *Daimler* case, to the effect that, "in the case of an incorporated company, the right and power of control may form a true criterion."<sup>13</sup> The *Daimler* case was long

<sup>10</sup> [1919] A. C. 993.

<sup>11</sup> *Ibid.*, 997.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*, 997-8.

and complicated, and there was, as stated, disagreement among the judges, although a majority was able to join in the opinion of Lord Parker of Waddington. The decision in the *Hamborn* case is therefore of importance, in that Lord Sumner, who was of the majority in the *Daimler* case, stated and applied its principles to the *Hamborn* case, without dissent on the part of any member of the court of last resort. His Lordship stated that "control" is "of those persons who are the active directors of the company and whose orders its officers must obey or [and this is the most important point] the control of those persons who in their turn are the masters of the directorate and make or unmake it by the use of the controlling majority of votes."<sup>14</sup>

The *Daimler* and *Hamborn* cases have been dwelt upon at considerable length in that they discovered the fact behind the fiction,—that the company was an agency of the natural persons and the directorate their agents for the purpose for which the companies were incorporated. The *Daimler* company, to speak only of the first case, was organized according to the laws of England and was registered in England. According to the decision of Lord Chief Justice Reading, who delivered the opinion in the Court of Appeal, it was therefore British—not German—and hence trading with it was not trading with the enemy. The Supreme Court of Appeal of the House of Lords, however, looked beneath the surface to find the natural persons who had created this organization,—who were German and therefore at the time enemy persons. If the artificial person depended, as it clearly does, upon the natural persons, by whom it is brought into being, the majority of the shares held by the natural persons would control the conduct of the artificial person and its agents. The company would thus be a mere agency and the directors merely the agents of the natural persons and subject to their control, and the quality and character of the artificial person would be that of the natural persons forming it, for it is obvious that the natural persons could not invest their agency with powers which they did not possess, nor could the directors in their capacity of agents exercise greater powers than those belonging to the natural persons who were their principals. The artificial person, notwithstanding the mystery and awe with which it has been regarded, is nothing but the creation and the agency of natural persons and its acts should be tested by the rights and the duties of the natural person.

The House of Lords is, as we have said, the Supreme Court of Appeal in the English system of law. Its authority is commanding and its reasoning can not be gainsaid. A more persuasive authority there is than the reasoning of their Lordships. It is but a few lines, with which they were familiar long before they had adorned the Bench and with which every person within the range of a feeble voice is also familiar:

Sing a song of sixpence,  
A pocket full of rye;  
Four and twenty blackbirds  
Baked in a pie.

<sup>14</sup> [1919] A. C. 998.

When the pie was opened  
 The birds began to sing;  
 Was not that a dainty dish  
 To set before the king?

They are still singing.

Great conceptions are easily explained when they are understood, for they consist of simple truths.

So much for the profit-making person. Let us see if this doctrine does not apply equally to organizations of human beings for a collective purpose.

The people, inhabiting the territory formerly called the Province of Massachusetts Bay, do hereby solemnly and mutually agree with each other, to form themselves into a free, sovereign and independent body politic or state, by the name of THE COMMONWEALTH OF MASSACHUSETTS.<sup>15</sup>

In both cases we have a corporation, each composed of definitely identified persons. One forms a collectivity which we call a corporation for profit, and the other forms a body politic to carry out the end which the good people of the Province of Massachusetts Bay had in mind. They knew what they were doing, and, having nothing to conceal, they stated it. Their purpose was to form "a free, sovereign, and independent body politic," that is, an organization separate and distinct from any other organization, and consisting of a group of persons inhabiting specified territory,—the Province of Massachusetts Bay.

Here we have an example of the inhabitants of a definite and specified territory organizing themselves into a body politic; but the matter of territory is, in the larger sense, irrelevant. The body politic is a thing of the spirit, not of territorial boundaries. The proof of this is supplied by a group of people approaching for the first time the territory "formerly called the Province of Massachusetts Bay." They were not, however, as yet inhabitants of that territory nor of any territory; indeed they were upon the high seas and in the storm-tossed *Mayflower*. I mean those natural persons whom a grateful posterity reveres under the name of the Pilgrims. They were, as I have said, approaching the shores of Massachusetts (land to which they had no title, as the charter which they had procured was for the northern parts of Virginia), but, driven northward out of their course by the elements, over which no man has control—whether Pilgrim or Puritan—they were directed, although they did not know it, to the stern and rock-bound coast of what was later to be called Massachusetts. They felt the need of an understanding, of an organization to effect the purposes for which they had put to sea and were soon to set their foot upon an unknown and a mysterious world. The spirit in which they met the problem of government—for it was none other—is set forth in a few lines with which the state as a body politic, with a single and moral standard, begins in this New World:

<sup>15</sup> F. N. Thorpe, *Federal and State Constitutions*, Vol. III (Washington, 1909), p. 1893.

In ye name of God, Amen. We whose names are underwritten, the loyall subjects [they were a shipful and a small shipful only] of our dread sovereigne Lord, King James, . . . haveing undertaken, for ye glorie of God, and advancemente of ye Christian faith, and honour of our king & countrie, a voyage to plant ye first colonie in ye Northerne parts of Virginia [from which they were diverted, as I have said] doe by these presents solemnly & mutuall in ye presence of God, and one of another, covenant & combine our selves together into a civill body politick, for our better ordering & preservation & furtherance of ye ends aforesaid; and by vertue hearof to enacte, constitute, and frame such just & equall lawes, ordinances, acts, constitutions, & offices, from time to time, as shall be thought most meete & convenient for ye generall good of ye Colonie, unto which we promise all due submission and obedience.<sup>16</sup>

This document, which appropriately bears the name of the "Mayflower compact," is the ancestor of the compact of the "persons inhabiting the territory formerly called the Province of Massachusetts Bay." The members of the earlier body, without territory, combined themselves "together into a civill body politick" just as the good people of Massachusetts some two centuries and a half later formed themselves into a civil body politic which, however, the inhabitants, having had experience, called "a body politic or State"; and, being inhabitants of definite territory—as the Pilgrims were not—they applied to their organization the name of the Commonwealth of Massachusetts. In other respects the acts are one and the same, with the difference that the Pilgrims declared themselves to be loyal subjects of their "dread sovereigne Lord, King James," whereas their descendants, repudiating their dread Lord, King George the Third, organized themselves into a "free, sovereign and independent body politic or state." Upon the high seas the Pilgrims were surrounded by a waste of waters, with but the heavens above them.

There is, it is believed, no better evidence to be found in recorded history that the state is a thing of the people who create it and not of material boundaries; that the civil body politic is an organization of the people for certain ends and purposes; that the organization, whatever its name—or whether it be without a name, as in the "Mayflower compact"—is the agency of the people, consciously created to carry into effect the aims and purposes of the people creating it; and that the officials, be they few or many and whatever they may be called, are in fact but agents for accomplishing, in behalf of the people, the aims and the purposes for which they had covenanted and combined themselves "together." We have here a status, not a state, and evidence that the function of territory is to supply the place within which those who combine themselves into a civil body politic may dwell and exercise jurisdiction.

Now if the state is a body politic or political corporation, and if it be said

<sup>16</sup> William Bradford, *History of Plymouth Plantation*, Collections of the Massachusetts Historical Society, 1856, 4th Series, Vol. III, pp. 89-90.

that it is an entity separate and distinct, there is then no difference in law between the political and the commercial bodies, although there may be a difference in purpose,—the difference, perhaps, not being so great as might be imagined.

The purpose of the Daimler corporation was to administer to the happiness of the natural persons forming it for their financial profit. The purpose of the body politic or the state by the name of the Commonwealth of Massachusetts was the pursuit of happiness (albeit in a larger sense) of the good people of the erstwhile Province of Massachusetts Bay.

Hence if the highest law court of Great Britain—than which there is no court of justice more universally respected, at home or abroad—could uncover a corporation in order to discover the individuals who composed it, and if the rights and duties of the corporation depend not upon its artificial personality but upon the rights and duties, in the particular case, of the natural persons who formed it, it would seem to follow that we might look beneath the surface of the Commonwealth of Massachusetts and find there the successors of the good people who mutually agreed with each other to form themselves into a body politic. Indeed we might further look beneath the surface of a still larger body politic and discover those human beings who described themselves as “we, the people of the United States.” Nay, more, international tribunals might likewise uncover the parties to the suits which they are adjudicating. The result would be to admit, in law as well as in fact, that rights and duties, if looked at in the larger instead of the narrow legal sense, are—in a corporation for profit, as well as in the body politic organized for the pursuit of happiness,—not the rights of the artificial persons or the duties of a fictitious body, but the rights and duties of the individuals forming the one or the other, from which it follows that the rights and duties of the group will be those of the individuals composing it, and that in the relations between these groups—not the artificial but the natural groups—the same rights and duties must necessarily exist. Thus we have the basis of law for the individual, for the group of individuals and for all individuals—a law which, to be law, must be consistent with the nature and dignity of the individual human being.

If we continue to look upon the state as an artificial person, instead of a thing of men and women and children, we may end by being the victims of our Frankenstein—a soulless mechanical thing which inevitably destroys itself. Legal fictions are useful things, but they should not be our masters.

The state as a political corporation has no rights of its own. It is merely an agency of the citizens of the state for the execution of their will. But their will is the will of individuals, and the law which they make must be that law—and only that law—consistent with the nature and the dignity of the human being: in simplest terms, it must be the moral law of the individual and not the unmoral law of the corporation. There is but one standard of morality,—that for the individual, as such, whether it be that



for the individual associated in a company for profit-making or in a body politic for the pursuit of happiness of its members. There is but one standard of honor, the honor of the individual, and the corporation has and can have no other standard, if facts instead of fictions are to prevail. And, as the individual has the right to redress wrongs only through process of law, the company or the corporation should only have the same right, likewise through process of law. If the individual does not have the right to kill when it so pleases him, neither has the company or corporation the right; and if the individual does not have the right to employ force, the company does not have the right.

And as the group can not have greater rights than those of the individuals of which it is composed, it follows that the individuals of different groups—as individuals—can not possess any rights inconsistent with the nature and dignity of the human being. The world, notwithstanding the artificial personality called the state, is made up of human beings. Their laws must be consistent with their nature, the laws of human kind are not and can not be the dictates of the artificial entities which we call states, since these entities in fact have no existence separate and distinct from their incorporators,—the people who have made them what they are.

We have thus the measure of law: it must be moral and it must be spiritual in essence—whatever its material content—if it is to be consistent with the nature and dignity of humanity, in which right, not might, prevails, and in which the soul of man, triumphing over the material and the artificial, seeks the everlasting verities. Getting underneath the surface of the state, we have found it, not a personality, but a body corporate, with many members. The international community, made up of states, will become a gigantic artificial person unless we continually look behind the outward form of each member and recognize humanity.

We now come to the question: when is an artificial person not an artificial person? To which the confident answer is: When it is in the interest of the persons dealing with it to consider the rights and duties of the natural persons composing it; as in the *Daimler* case when their Lordships considered it to be in the interest of their fellow countrymen to deal with the artificial person as human beings and not as a fiction of the law. What decides the policy of the directors? The majority of the shareholders; or rather, the votes of the shareholders; so also within the artificial person which we call the state, the directors, who are frequently called politicians, are prone to look to the majority of the voters who share in the political corporation. Now, if a corporation can be opened up in time of war in order to find enemies, there is no reason why a corporation should not be uncovered in time of peace in order to find friends. And if the principle is accepted in time of peace as well as in war, we have opened the largest of all corporations—that aggregation of human beings who, taken together, spell the international community or humanity.

There can not be two standards. There must be a single standard for the human being applying to all of his activities, whether they be isolated or communal: a house divided against itself falls. There can be but one standard for the groups of individuals which we call states. There can be but one standard for the groups of individuals which, taken together, form humanity, and the groups which, as such, compose the international community. Humanity needs and the world must have the moral interpretation of history.

It used to be the custom—perhaps it still is—for children, without discrimination as to sex, to specialize in “albums,” in order to obtain the signatures of the great and of the near great, and, in most instances, of the not so great at all. The custom, apparently, was not merely of our day, because before a Pilgrim or a Puritan set foot in New England, Sir Henry Wotton, of old England, had written a “something” in an album, and he wished later—as often happens—that he had not written it. “An ambassador is an honest man sent to lie abroad for the commonwealth.” When Sir Henry wrote it, however, he seemed to have been proud of it, because in a letter of 1612 he says, “This merry definition of an ambassador I had chanced to set down at my friend’s, Mr. Christopher Fleckamore, in his Album.”

To use Sir Henry’s language, he “chanced” to be an ambassador and it is presumed that he knew the qualifications and duty of an ambassador of his day. To judge from his conduct in the performance of his duties, he was indeed sent to “lie abroad” in behalf of the artificial person which he represented. Honest he no doubt was in the ambassadorial sense of his time; moral he no doubt was according to the standards of his profession; but it is to be hoped that he had another standard, that is to say, the standard of a Christian gentleman, which he so admirably expresses in his lines on *The Character of a Happy Life*, destined to be as immortal as the Elizabethan English in which they are written.

His ambassadorial post was Venice, then a center of devious diplomacy, where, off and on, he represented his country for some twenty years. His “merry definition” became public, and it created a stir in the world. It is, it may be said, his only contribution to the literature of diplomacy. It can well be imagined that the country to which he was accredited was not inwardly pleased—if not outwardly protesting—at an ambassador who had so indiscreetly withdrawn the veil from diplomacy, thus exposing it in all its nakedness to the naked eye.

Then too, his royal master, James VIth of Scotland (and the First of England) was not over pleased with “the merry definition,” for it could but reflect on him as sending an ambassador for the purposes, real or alleged, contained in Sir Henry’s *bon mot*. However that may be, he was not allowed to “lie abroad” continuously but spent his declining years of “penitence”—although they apparently did not seem so to him—as provost of Eton

College, which had the advantages of reflection peculiar to a monastery, without its asceticism.

Let us say frankly that the whilom ambassador sinned, but his sin was in giving an outward and classic form to what many people of the day thought of an ambassador, and what we of today are obliged to think—if we are honest with ourselves—of the standard of morality which those artificial persons called states proclaim and follow. His “merry definition”—half in jest but perhaps wholly in earnest—has lost its point, we would like to think, and the definition today should be—as we believe it is—an honest man sent to reside abroad that he may speak the truth in behalf of his country. If not speaking from his own experience, Wotton had had at his elbow Albericus Gentilis, professor of civil law at Oxford during his own student days, an authority on ambassadors—witness his book on the subject—and was at the same time a friend of John Donne, a Christian and a poet,—and great in both capacities—toward whose views, rather than those of Gentilis, Sir Henry seems to have returned in later life.

Every person has a mission,—the conversion of self to spiritual ideals, for after all the intangible is the only thing that matters, and invisible though it may seem to be to the material eye, it is ever present and real to the spiritual eye. We only need the experience of Greece to the effect that profitable things are of the moment, whereas the spiritual things are of all time. Therefore our mission is, or should be, one of self-conversion. How can we hope to convert others if we ourselves are not converted? How can we ever expect that the ideals of the founders of our Republic shall prevail unless we have them not merely in the cold type of the printed page, but deeply inscribed in our very hearts and souls? For if these ideals be not a part of each and every one of us—however insignificant we may be individually—they can not be incorporated in the practice of this body politic which the hands of the founders fashioned, not as an artificial thing, but as an agency for the transmission of the imperishable truths of the Declaration of Independence both to our posterity and to the nations of the older worlds.

The conversion of self means to do to others what we would that others should do to us, or, as Justinian paraphrased the Golden Rule,—to give everybody his due. It will be observed that this is a positive duty. It is a something to be done. But in matters international it is more acceptable to state the duty in negative terms, the folding of the arms, as it were, without extending them. Therefore the duty is sometimes stated as not to do to others what you would not like others to do to you,—to invoke a phrase from Francis of Vitoria, which is also to be found in Albericus Gentilis, the friend of our friend, Sir Henry Wotton.

Let us take an illustration of self-conversion on our part. In 1845, James K. Polk, President of these United States, directed one Zachary Taylor—then a colonel in the United States Army and destined to succeed Polk as President—to occupy that portion of Texas between the Rio Grande



on the west and the Nueces River on the east. Texas, largely settled by Americans, had recently, by force of arms, acquired its independence of Mexico. Title to the territory between the two rivers was still in dispute. Mexico and Texas had, however, agreed upon the terms of a treaty by which Mexico would recognize the independence of Texas and the disputes as to territory would be submitted to arbitration.<sup>17</sup> President Polk ordered Colonel Taylor to occupy this territory. He did. A detachment of Mexican troops crossed the Rio Grande and clashed with the United States forces. In these circumstances, President Polk asked Congress to declare that a state of war existed between the two countries, on the ground that the Mexicans had invaded what President Polk was pleased to call the territory of the United States. Texas had already suggested arbitration of territorial questions, which suggestion Mexico had tentatively accepted. Therefore the United States, as a nation, of which Texas had become a State, could and should, in my opinion, have submitted the question of territorial boundaries to due process of law, if it had looked upon itself as a natural instead of an artificial person, with an artificial sense of honor, which apparently requires for its realization the sacrifice of human life.

I would not have it appear that I have cited the Texas imbroglio in order to bolster up a personal theory. Therefore I invoke the opinion of a great American statesman, none other than Mr. Elihu Root, who, a few years ago, speaking "over the air" at a banquet which the Union League Club in New York had tendered him on his eightieth birthday, mentioned the changes for the better in his long, eventful and eminently useful life and informed his invisible, as well as visible, audience, that the Mexican War could not have happened today. It could never have happened, I verily believe, but for the artificial conception of the state. With the acceptance of the rights and duties of the state as an agency of the natural persons forming it, force must inevitably surrender to law.

The claim of Texas extended to the Rio Grande, and in annexing Texas, we annexed its claim. The war with Mexico was ostensibly to secure the boundaries to which Texas was entitled; and Mexico was, as President Polk well knew, unable to withstand American arms.

But victory is sometimes as dangerous a thing for the victor as it assuredly is for the victim. Not only was the title of the United States to extend, as a result of the war, to the Rio Grande, but in addition, a vast territory was ceded by Mexico to the north and the west from which the States of California, Utah and Nevada, and substantial parts of Arizona, Colorado, New Mexico and Wyoming, were carved. There were many people who thought at the time that a desire to increase the slave territory of the United States had something to do with the war and its territorial acquisitions. Without expressing an opinion on the matter,—which is unnecessary to the present purpose—the result was the extension of the

<sup>17</sup> Sen. Doc. No. 1, 29th Cong., 1st sess., p. 88.

slavery question to the new domain and the Civil War is thought by not a few people in these United States of our time to have been the outcome. An outward concession was made to morality. Conquest was disguised in an article of the treaty between the two countries as a cession, for which the Government of the United States was to pay, and actually did pay, to Mexico some \$15,000,000—a sum somewhat larger than thirty pieces of silver, but none the less the evidence of an immoral transaction.

At the same time, the Government of the United States had the opportunity of another war with its neighbor to the north. One of the battle cries of the presidential campaign of 1844 was "54-40 or fight,"—which, interpreted in terms of territory, meant that the northern boundaries of the United States upon the western coast were to be fixed at fifty-four degrees, forty minutes, northern latitude. It was one thing, however, to proclaim a boundary. It was another thing to secure its acceptance. In international matters, there is at least a second party. The party on that occasion was Great Britain, and its ears were not attuned to "54-40." Why not annex the territory in dispute, as we did the territory to the south? What possible difference could there be in a matter of geography, whether the territory was to the south or to the west or whether it was to the north? Yet there was a difference. Our southern neighbor was weak and unable to resist. Our northern neighbor was Great Britain and set on resisting. Hence we compromised. We took by force what we wanted to the south, because we had the force; and we took what we could get to the north by peaceful negotiation, without the use of force. We thus had a double moral standard at one and the same time.

Many years later the Government of the United States declared itself to be in a state of war,—not with a neighbor but with a Power—this time a great Power—across the seas; for in the meantime we too had grown great and powerful and were therefore in a position to measure our strength against a strong Power. Victory inclined to the Allied and Associated Powers, for we were but one of Germany's enemies. Our government took part in the negotiations at Paris resulting in the Treaty of Versailles. The President of the United States, Mr. Woodrow Wilson, attended in person, in his own name and in his own behalf, that he might through his influence persuade the nations of the world—not merely those which had taken part in the World War, but also those which had been able to preserve their neutrality "against a sea of arms,"—by a League of Nations, to unite their forces as a single strength against a nation which should violate the territorial integrity, or the political independence of one of the contracting parties. The great Powers, and especially those which had been associated in the war, were necessary, President Wilson believed, to its success.

The accession of Japan was thought to be uncertain. It had entered the war for the purpose—its declaration so stated—of dispossessing Germany of its possessions beyond the Pacific and restoring them to China. At the

Peace Conference, President Wilson feared that unless Shantung were left in the possession of Japan, which had seized and occupied it, that Power might refuse to accept the Covenant of the League of Nations, and thus frustrate the realization of the great dream. Therefore, President Wilson had the Chinese delegation informed that he was obliged for this reason to consent to the cession of Shantung to the Japanese. Now it happened that President Wilson's emissary lunched with us in Paris, after he had informed the Chinese of the decision which the President considered himself obliged to take: an agreement to a cession of territory which was not the property of the United States. What would have been the reaction of President Wilson's countrymen had the proposed cession been that of California,—an academic, but somewhat pertinent, question—in order to obtain the adherence of Japan to the Covenant of the League of Nations? Again the double standard, of which President Wilson was the unwilling victim.

As I learned of the consummation of the cession at a luncheon in our modest quarters in the Hotel de Crillon, I may be permitted to complete the incident by another personal reference. Some years later, during the Arms Conference in Washington, it was my privilege to draft the treaty, upon the dining table in our Washington residence, with a distinguished representative of China—now, appropriately, a judge of the Permanent Court of International Justice at The Hague—by which Shantung was to be, and actually has been, retroceded to the then as now sorely tried Republic of China. And I may say, ladies and gentlemen, that I consider it a very great honor to have been permitted to be a party to the undoing of the consequences of the double standard by means of the single and moral standard, applicable alike to nations as to individuals.

The preference accorded to the double standard, constitutes, I am happy to believe, an exception to the general policy of the United States. I am greatly mistaken if the choicest examples of the violation by nations of the single moral standard throughout recorded history have not been beyond the confines of these United States. Let us look at the reverse of the medal.

On the 18th of June, 1812, the Government of the United States (then a weak Power) declared war against Great Britain. A treaty of peace ending that war was signed at Ghent on Christmas Eve three years later,—perhaps an unconscious augury of the relations which were to exist between the peoples of the English-speaking world. It was the desire of both countries that the peace they were then making should be unbroken, and in order to prevent a resort to arms, they entered into an agreement in a later document, which seemed to its signatories hardly important enough to submit to the Senate for its advice and consent,—the so-called Rush-Bagot Agreement. It was, however, subsequently submitted to and approved by that body. As diplomatic documents go, it is a small affair. It was a mere exchange of notes, the first signed by Charles Bagot, the British negotiator, in the city of Washington, on April 28, 1817, exactly one hundred and fifteen

years ago to the day; the second signed by Richard Rush, Acting Secretary of State, on the day following (April 29). The material portion of Mr. Bagot's note (which Mr. Rush accepted on the morrow in a note paraphrasing the language of the British negotiator) reads:

His Royal Highness, acting in the name and on the behalf of His Majesty, agrees, that the Naval Force to be maintained upon the American Lakes by His Majesty and the Government of the United States shall henceforth be confined to the following Vessels on each side—that is

On Lake Ontario to one Vessel not exceeding one hundred Tons burthen and armed with one eighteen pound cannon.

On the Upper Lakes to two Vessels not exceeding like burthen each and armed with like force.

On the Waters of Lake Champlain to one Vessel not exceeding like burthen and armed with like force.

And His Royal Highness agrees, that all other armed Vessels on these Lakes shall be forthwith dismantled, and that no other Vessels of War shall be there built or armed.<sup>18</sup>

Mr. Rush was informed in the concluding part of the note that the agreement could be abrogated by either party on six months' notice, and that His Royal Highness had already given the necessary orders to carry the agreement into effect in such a way as not to "interfere with the proper duties of the armed Vessels of the other Party."

Here we have the acceptance by a strong Power—then the greatest in the world—of a proposition made by a weak Power—now the strongest in the world—to prevent border incidents which might arise between their respective possessions. "This stipulation," to use the language of the correspondence, is still in effect, with the result that on neither side of the invisible line of some four thousand miles separating the Dominion of Canada from these United States of America is there a fortress, an army post or even a sentry.

The fruits of equal justice, are they not good understanding and permanent peace, under the control of a sound and universal morality?

The lakes in question—we have it upon the authority of the Supreme Court of the United States some thirty years ago<sup>19</sup>—then carried a larger commerce than that of the Mediterranean. What might happen, ladies and gentlemen, I leave to your imagination, if the good people now discussing in Geneva the limitation of armament should extend the modest stipulation affecting the American Lakes,—which, after all, are not insignificant—to the larger bodies of water which we call oceans. I remark, however, that the Rush-Bagot Agreement still exists, and that the will to limitation of armament is the way to limitation of armament, and the standard is at hand.

<sup>18</sup> Treaties and Other International Acts of the United States of America, edited by Hunter Miller, Vol. 2 (Washington, 1931), p. 645.

<sup>19</sup> *United States v. Rogers*, 150 U. S. 249.

Let us now invoke a second instance of the single moral standard.

Many years later, to be specific, in 1893, President Cleveland, on assuming the presidency for the second time, after an absence of four years from the White House, found that his immediate predecessor had taken advantage of an uprising in Hawaii (in which Americans, and indeed American officials, had taken part) to negotiate and submit to the Senate a treaty with the government which had succeeded that of Queen Liliuokalani in the government of the islands, the stepping stone from the United States to the Far East. By the terms of this treaty, negotiated by President Harrison and the revolutionary government, Hawaii ceded itself to the United States. President Cleveland, convinced that a wrong had been done, withdrew the treaty from the Senate, and sent a commissioner to inquire into the circumstances, as he was unwilling that his administration should be a party to the commission of an international wrong, even though it might redound to the material advantage of the United States.

The reasons for this action are set forth in an unforgettable message to the Congress of the United States.<sup>20</sup> As I have already mentioned the subject in a previous address before the American Society of International Law, which I was privileged to deliver some two years ago, I shall not dwell upon the details of the incident. I would like, however, to quote a passage of a few lines from the message whose application to international situations is essential to the due process of law between nations. They are:

I mistake the American people if they favor the odious doctrine that there is no such thing as international morality; that there is one law for a strong nation and another for a weak one, and that even by indirection a strong power may with impunity despoil a weak one of its territory. . . .

The law of nations is founded upon reason and justice, and the rules of conduct governing individual relations between citizens or subjects of a civilized state are equally applicable as between enlightened nations.

Here we have a statement of the utmost importance: that the standard of a citizen or subject of a civilized state is the standard to be applied between enlightened nations. More we can not ask. Less we should not accept. It is the moral standard applicable to human beings, irrespective of sex, race, nationality or geography.

If we are to consider the state as composed of civilized citizens or subjects,—and what state would deny that its citizens or subjects are civilized—which standard is to be equally applicable as between enlightened nations—and was there ever a nation which did not insist that it was enlightened, whatever might be the case of its neighbor, we have, fortunately, in an international case of the utmost importance, the decision of my Lord Parker of Waddington and his colleagues of the House of Lords—a decision which

<sup>20</sup> Special Message, Dec. 18, 1893, Messages and Papers of the Presidents, Vol. IX, p. 470.



brushed aside the artificial body and stood face to face with the individuals composing it. And if the brushing process can take place in one instance, it can in every instance, and if it occurs in every instance, we substitute for the artificial person and the artificial standard of a legal entity—if it be not more properly called a legal fiction—the standard of human beings which has been slowly developed from the Stone Age until this year of Our Lord one thousand nine hundred and thirty-two. The artificial standard, the artificial honor and the artificial things called “vital interests”—words which the so-called statemen use—but which no one has ever been able to define in terms of the human being—culminate in what may be called the paramount duty of the state: to preserve its artificial life.

But we have it on excellent legal authority that there is something more than individual life, and that the preservation of mere life is not the highest duty of the individual, and therefore can not be the highest duty of the individuals forming the state and of the international community formed by groups of states. A few years ago, in 1884, within the lives of people now living, another case was decided in an English court of justice. It was the *Dudley* case,<sup>21</sup> decided by Lord Chief Justice Coleridge, to which I pin my faith as I do to the *Daimler* case, decided by Lord Parker of Waddington. A British vessel had suffered shipwreck. The survivors were adrift on a raft. There was no relief in sight and the primal material instincts of the human being were slowly but surely overcoming the spiritual nature of man. Hunger was the master of the floating raft. A mere boy fell a sacrifice. Later the survivors were picked up by a passing vessel. They were landed in England,—that country of just laws and their equal administration—where the survivors stood trial for an atrocious crime. In the opinion of the Lord Chief Justice Coleridge—which was also the opinion of the court—it was stated:

Now it is admitted that the deliberate killing of this unoffending and unresisting boy was clearly murder, unless the killing can be justified by some well-recognised excuse admitted by the law. It is further admitted that there was in this case no such excuse, unless the killing was justified by what has been called “necessity.” But the temptation to the act which existed here was not what the law has ever called necessity. Nor is this to be regretted . . . The absolute divorce of law from morality would be of fatal consequence, and such divorce would follow if the temptation to murder in this case were to be held by law as absolute defence of it. It is not so. To preserve one’s life is, generally speaking, a duty; but it may be the plainest and the highest duty to sacrifice it. War is full of instances in which it is a man’s duty not to live but to die.<sup>22</sup>

The acceptance of necessity would have had unacceptable consequences which his Lordship was careful to enumerate.

<sup>21</sup> Reported in 15 Cox’s Criminal Cases, p. 624; 14 Queen’s Bench Division, p. 273.

<sup>22</sup> *Ibid.*, p. 287.

It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting, was chosen. Was it more necessary to kill him than one of the grown men? The answer must be "No."

"So spake the Fiend, and with necessity,  
The tyrant's plea, excused his devilish deeds." <sup>23</sup>

I submit, ladies and gentlemen, that this single moral standard applicable to the individual is applicable to the group of individuals united in society in a body politic, whether we call it commonwealth, state, or nation.

There is another authority,—something more, if you please, than a judgment of a court of the United Kingdom,—an authority with which we of President Cleveland's civilized state and of his enlightened nations have been familiar from our earliest days.

On a certain occasion, the Man of Nazareth was taken up on a high mountain and was shown the kingdoms of the world at His feet; and He was promised that if He would kneel down and acknowledge the supremacy of His guide, all material things should be His. His reply was: "Get thee behind me, Satan," which should be the reply of every minister of foreign affairs whenever he may find himself face to face with the temptation to yield to the artificial standard in the performance of his duty.

To the artificial person, with its artificial standard, should we not prefer the standard of the Man of Nazareth,—a standard which is the only guaranty of a happy and abounding life within or beyond the confines of our state and the hope of a life hereafter?

(Mr. CHARLES HENRY BUTLER thereupon proposed the names of the following members for the Committee on Nominations: Admiral William L. Rodgers, Charles E. Hill, Clyde Eagleton, Fred K. Nielsen, and R. R. Wilson.

There being no further nominations, the Secretary, upon motion duly made and seconded, cast a single ballot of the members present for the nominees, and the President declared them duly elected.)

The PRESIDENT. The Chair recognizes Mr. Butler, who will now proceed to pay his respects to the address to which you have had the painful duty of listening.

#### DISCUSSION OF THE PRESIDENTIAL ADDRESS

Mr. CHARLES HENRY BUTLER. Mr. President, ladies and gentlemen, members of the International Law Society: Some time ago our very efficient chairman of the Program Committee asked me if I would be one of those who

<sup>23</sup> Reported in 15 Cox's Criminal Cases, p. 624; 14 Queen's Bench Division, pp. 287-8.



would follow the President and discuss his remarks on this occasion. I replied I would be very glad to do that if I knew what the President was going to say, and all of us who were supposed to take part in this discussion were supposed to be supplied with the President's address some time ago. We only received it this afternoon. If we have not been able to digest it, we have been able to listen to it and enjoy it. I do not know as we are inclined to criticize it.

During the course of the address I heard one Machiavelli groaning in his grave to think his principles would be departed from in such a wholesale manner as you have heard they should be tonight. I agree with our worthy President, that the Decalogue should apply to governmental matters, and that even if the actions of the state are not bound by the commandment "Thou shalt not covet thy neighbor's territory," still they are more or less bound by the commandment "Thou shalt not steal." I think that the world is growing up to that.

The Secretary in his address tonight called attention to that product of the Second Peace Conference at The Hague, which was, in my opinion, worth the entire expense, time and trouble of the whole conference—Powers should no longer collect contractual debts from foreign countries in favor of their nationals by force of arms—and I think that the "Resolution Porter," as it was called during the term of the Peace Conference, was really one of the greatest advances toward the peace of the world that we have ever had. It clearly recognized the principle that force should not be used to collect debts that had not been juridically determined to be just, and where a nation had not refused to pay it or had not refused to arbitrate.

There are one or two points in our President's address that I am not in entire sympathy with. I am not prepared to admit his criticisms, in full, of what took place in the 40's in this country—the Roaring Forties, you might call them. I am not prepared to admit that the United States took any territory from Mexico simply because Mexico was weak and it was strong, or its boundary was not extended to the north because Great Britain was strong and the United States was weak. I have no sympathy in those matters with the wholesale criticism which has been thrown upon the United States and the people who directed its governmental policy at that time. If we settled the northwest boundary by compromise, it does not mean we got out of it because we felt we were not strong enough to assert it. It meant we had come to the conclusion that the line accepted was the proper boundary. If, on the other hand, we felt that our fight with Mexico was a fair one, I see no reason now for criticizing everyone who took part in that event. So far as the subsequent events are concerned, it was no misfortune to the United States, or to the world at large, or to Mexico, and I am not ready to admit that the criticism that has been made of our country in regard to those events is just.

This question of an exact standard for individuals and for the country,

and its officers, is one which is more or less axiomatic. All great moral foundations must be based on the principles of justice. There is one sentence, however, of our President's address—"If the individual does not have the right to employ force, the company and the state does not have the right"—which I am not sure that we can entirely concede as right. The individual cannot take the administration of justice in his own hands. The individual cannot exercise the right of the law to execute and to kill in revenge. The state can kill and can punish, but I admit the state should have a proper and legal basis for its execution, and I believe at the present time nearly all the countries of the world are actuated by what may be described as this single standard of morality.

I believe the countries of the world are today a great deal further advanced in that direction than they have ever been before. I do not believe that Machiavelli's principles would have the same acceptance at the present day as they had perhaps a hundred years ago. I believe the work which this institution, and other similar associations and organizations, and the great mass of the populace, are doing, is educating the countries of the world and the people up to a higher standard in governmental morality.

I would like to comment now on the letter received from Mr. Root, and published with the President's address. It has not been read yet. It was read last year, but I would like to have it read at every session we hold. Mr. Root says:

The reason why the Society of International Law has lived and prospered is that it answered to a real need. Of course the process has only just begun. The need continues and the Society must continue with its active and unwearied industry. By virtue of its early entrance on the field it has beyond anybody else the finest thing in all the world, a real practical opportunity to contribute substantially to the advance of civilization.

I think those words should give us encouragement and give us also the strength and determination to gird up our loins and let the good work go on.

The PRESIDENT. The Chair recognizes Mr. Coudert, Vice-president of the Society.

Mr. FREDERIC R. COUDERT. Mr. President, and my friends: If I mount to the rostrum beside the President, it is not because I assume that any *escalier* could raise me to that height, or raise me to a position elevated enough to look down upon this audience, but I have an inferiority complex. I am afraid if I were not here I might be lost in the shuffle.

It is with great pleasure that I know we are limited to ten minutes, because I remember a reverend bishop once, speaking to some newly ordained clergy, and he explained to them, with that keen zest which the higher clergy possess in dealing with the lower clergy, that in speaking, in their sermons, they should remember the fact that no souls are saved after the first ten minutes.

I believe that that contains a maxim of profound authority, which even the Society of International Law, which is not wholly clerical or anti-clerical, might well emulate.

As for criticizing the President's paper, I feel as Moses did when he was tending his father-in-law's flocks on the plain, and he saw the burning bush and heeded to the admonition to take off his shoes and to tread lightly. I should hardly dare to go as far as my predecessor went or do anything but pronounce encomiums on that very interesting pronouncement.

When he speaks of the morality of states, I am reminded of the colored clergyman who spoke to his flock the other evening, and they asked him what was the subject of his discourse, and he said, "It am de status quo." One of the brethren inquired of him, "Mr. Minister, what am de status quo?" And the answer was, "De status quo am de mess what we is in now." I don't think "de mess we am now in" is wholly due to the corporation lawyers. They are a very much abused class, but now that they are quite as poverty-stricken as the rest of the community they are looked upon, I think, with more charity.

After all, even corporations had rather a respectable origin. I remember a number of years ago the argument of a case involving the ecclesiastical properties in our Spanish possessions. I had occasion to find out something about corporations, and I found out that in the long ago, in the year 376 Anno Domini, the then Roman Emperor, Constantine, recognized the Church Catholic and Apostolic a corporation so that it might take and receive property and perform the other functions which a corporation usually performs. Perhaps that is the reason that the church itself has not always escaped blame for acts of a corporate character. But whatever the fact may be, the distinction between an individual and a corporation is very ancient, and as this incident shows, eminently respectable.

I agree with my friend, the President, whose elevating excursion into the domain of higher ethics stimulates our enthusiasm, I agree with him entirely that there are not two standards of morality, one for the corporation or the state and one for the individual. I think the late Lord Acton, that delightful scholar, that erudite gentleman, that great historian, who graced the Chair of History at Cambridge, was quite right when he said that in the verdicts of history you must apply the same acid test to the actions of men and states in the present and in the past.

I perhaps do not wholly agree with him as to that. I do believe, however, that the idea as it has been propounded by publicists and as it has been acted upon by a troubled and sinful world, that the state may do no wrong, is a mere inheritance from an older theory of the divine right of kings. That the king can do no wrong, is an axiom that every English and American lawyer, cognizant of the history of law, is familiar with; today the state can do no wrong and is not suable without a special statute conferring jurisdiction.

That I believe was a fiction in the beginning; doubtless it had its utility. It was perhaps beneficent in an age when it was necessary to clothe the rule of law, as against lawless violence, with the aura of divine right, but today it has become a rudimentary, unnecessary and, I believe, an impedimentary survival, and I think that international law, as national law, should rid itself of that fiction. The state, in national law, should be responsible to the individual for the wrongs it does, and the state, in international law, should be responsible to other states and to individuals, for the wrongs that it may do to them.

I am cognizant that under the older law, and perhaps in our new law, there were various anomalies and double standards. Many of you who read the old Anglo-Norman law books, apparently so devoid of all sense of humor, may remember of the differentiation of standards between lawyers and clergymen. For, said one of the old judges of the 13th century, "It is indeed a criminal libel to speak of a lawyer as a damned fool, for if he were such, he could not profitably pursue his profession. *Contra* as to the clergyman, to whom such a thing would be no impediment." Many of these distinctions, however, have become archaic, and I doubt now whether they would be admitted.

Older moralities do very strange things. In an older world, perhaps not now existent, and among primitive man, it was not only the proper thing, but probably sociologically it was the wise thing, to put out of the way one's grandparents, because they ate the food that would nourish the race, the children that were coming along. Nowadays, and under present law, it would be a most reprehensible thing—to shorten the days of any relative, even a mother-in-law. That shows the progress that society has made.

As to international law, first I may tell you something interesting in regard to President Cleveland, of whom our revered President has spoken. He was a man of extraordinary character and personality. He was absolutely fearless, and no cavalier of an older age was more steadfast in doing the right exactly as he saw it than was Mr. Cleveland.

An interesting thing happened the last day of February, 1897, just four or five days before he was to go out of the presidency. I happened then to be a young attorney, in my father's office, and I was present when a telegram came to him from the President of the United States, asking him if he could come to Washington at once on a most important matter. The telegram said, "I shall wait for you at any hour of the night."

We took a late train and I think we arrived at the White House on a raw February morning, at half past twelve or one o'clock, and there was only the watchman to greet us. We went in. I sat in an outer room by a little coal fire. My father went in and talked with the President perhaps an hour, and when he came out he told me that the President had said to him in substance: "Mr. Coudert, if there is one thing that I would abhor, it would be to have upon my head the responsibility for the shedding of innocent blood. I am convinced that things are so shaping themselves, that the jingo sentiment is

so strong, that the mob spirit is growing so rapidly, that we are drifting into war with Spain. I know from our representative in Madrid that the Spanish dynasty, and people wish to avoid this at any cost. Short of the fall of the monarchy, they will make all possible concessions, and with a reasonable measure of patience America will be able to avoid needless war." And then he went on to say, "I would like you, with the ability you have, to act as my personal representative in Cuba and Spain in bringing about an armistice and negotiating a peace which I know can be negotiated."

My father replied to the President that it was quite obvious that in five days nothing could be done, as there was to be a new administration and a new President, and Mr. Cleveland said, "Of course, I know that; I have that in mind. But I know Mr. McKinley; he is a good, Christian man; he would shrink as much as you or I from an unnecessary effusion of blood, and if you will accept, I will send for him and arrange with him that you will be continued in that position so that this danger of unnecessary warfare may be averted." My father explained to him that for personal reasons he could not undertake the mission.

I tell the story suggested to my mind by what the President has said, because it shows to my mind what a strong man may do, and I believe to this day it is quite possible that if that man, with his strength and character, had remained there, that war might have been averted. I say that, although I myself was one of the heroes of the Spanish War, and I might not have gone into history. There again we must not let the double standard influence us.

It does seem to me, however, that the real difficulty that we encounter is that there has been no rule of law for the nations, that nations have done all sorts of acts, unmoral, non-moral, immoral, and then by a process of rationalization have found excellent reasons for them. That is the thing that we of the Bar know something about, under the stimulus of proper retainers, and with the training that has taught us to distinguish various kinds of acts in various degrees. But however that may be, the difficulty has been that the states by reason of the fiction that they were sovereign and omnipotent and could do no wrong, have never been sufficiently subjected to law.

I believe that with all our troubles, with all our disturbances, or, as the negro preacher said, "The mess that we are in," immense progress has been made in the fact that there is at least one tribunal, administering for the greater part of the civilized world, except ourselves and Soviet Russia, international law. Subjection to law should mean one standard, a standard indicated by the current and best morality of the time, as enunciated by jurists and thinkers throughout the world.

**THE PRESIDENT.** I will now call upon Professor Reeves, of the University of Michigan.

**PROFESSOR JESSE S. REEVES.** This very interesting address of our distinguished President affords so many different angles of approach that it is very difficult in the very few moments allotted me to undertake to look into the underlying philosophy of the paper, in order to examine somewhat its



major premises. I do not understand that in this paper there is anything like a philosophical denial that the claims of morality have been non-existent in the system of international law as we know it. As a matter of fact, it has been rather irritating to some of our friends that international law has had so much morality in it, or claimed so much.

Our positivist friends are fond of distinguishing between law and morality, and have denied that international law was law. Austin held that international law was positive international morality. While Austin did not in any sense mean to deride international law on that account, there are positivists who say, "This is not law, this is mere morality,"—an idea which was foreign to Austin. There are positivists of that sort, it is true, but that was not the idea of Grotius, nor was it the idea of Grotius's eminent predecessors.

International law has always envisaged law as it should be, except in the minds of narrow positivists, and that morality, as we now call it, which might be called the principles of justice, was once the law of nature. Our conception today of the law of nature, and there has been a great renaissance of the law of nature, is different from what it was in the days of Grotius, and more particularly in the days of Pufendorf. It is no proper assumption today that human nature is and always has been the same. We cannot say, indeed, that the principles of morality have always been the same. When we talk about the eternal principles of morality, we are simply seeking to measure the principles of other times and other peoples in the light of our own standards. We call them "eternal" because we thoroughly believe in them and we think they ought to continue forever. In that sense they are to us eternal principles or standards of morality and justice; or else morality rests upon suprarational sanctions.

Very closely associated with the law of nature is the doctrine of natural rights. However often we throw the doctrine of natural rights out and say, "It is an outworn system of the 18th century," it comes back to us again. Every time that we undertake to restate social values in terms of the individual, the doctrine of natural rights returns. The doctrine of natural rights may be revolutionary at one time and seem to be reactionary at another. Nevertheless, pushing natural rights and individual morality back further and further, there comes an ultimate beyond which one cannot retreat, and that position we may call the indestructible position of the individual. That indestructible position of the individual varies from age to age, from time to time undoubtedly, and if we were to try to get a consensus of opinion as to what that position is now, we should have some difficulty in doing it.

Now, it strikes me as a very interesting coincidence that the very group of men who had written "*Liberté, Égalité, Fraternité*," as they did write, over the churches in France at the time of the French Revolution, the men who repudiated the Christian religion, were after all the very persons who undertook by a set of propositions to re-establish in a secular way the dignity and position of the individual. It is interesting to recall that in the Declaration

of Rights of 1793 during the French Revolution, when it was found necessary to set up a standard of conduct for the individual *vis-à-vis* the individual, that that rationalistic group set up this standard of "Do not unto others as you would not have them do unto you." For nineteen centuries or more that has been the ideal single standard, and however much we may depart from it in one program or another, by some scheme of privilege or whatnot, that, after all, is the standard, not the standard of privilege, but a very democratic standard, as I see it. This golden rule, negative or positive, is the fundamental *credo* of democracy.

Dr. Scott's state, as he envisages it, is a democratic state. Unfortunately, not all are democratic states in the sense in which I have just spoken. I do not think that the state is the agency of the people. I think the state *is* the people politically organized. The people who organize in a particular way are the state. That being the case, I cannot quite see that the state has a range of right and duties quite comparable to those of the individual, and certainly not a range of rights and duties comparable to those of a corporation, itself created by the state. Nevertheless, even though the state and the individual are very different, the will of the state is not the sum of the wills of the individuals, as Rousseau undertook to say many years ago. The *Volonté Générale* is different from the arithmetical sum of the individual wills. There is a difference, but that does not in any sense destroy the validity of the single standard. We derive our standard from the individual as an indestructible unit, and there is no reason, because the state is different in character, different in essence from the individuals who make it up, to deduce therefrom that the standards of conduct which we have taken from the indestructible unit known as the human being should not be applied.

I agree that there should be one standard, whether it be in law or in morality, whether it be in municipal law or in international law, and yet the position of the individual is very different. In the old days the individual was thought to be born and lived in sin. Sin was morality with a religious sanction. Dr. Fosdick regrets, as many of us regret, that so many have divorced morality from religion. The state is secular. Does it sin? The individual may commit a crime, but as yet we have had no position, no working out in the theory in international law of a criminal state. We are in a transition stage. Once there was no criminal law as between individuals. Once it was a matter of self-help and the most there was was a tort, and states, as to each other, are still only in the tort stage. What will the future develop? If it applies a single standard, will it impute crime to states? If it does so, what authority will make a state act a crime? If it does so, how will such crimes be punished? This I leave to succeeding speakers.

The PRESIDENT. Is there any further discussion? (After a pause):

The SECRETARY. The Chairman of the Committee on Nominations requests that the members of that committee hold a preliminary meeting here tonight before they leave.

(Whereupon, at 10:25 o'clock p. m., the session adjourned.)



## SECOND SESSION

Friday, April 29, 1932, 10 o'clock, a. m.

President JAMES BROWN SCOTT. Ladies and gentlemen: We shall now proceed with this morning's program, "The treaty situation in the Far East," and I shall ask Mr. John V. A. MacMurray, Director, Walter Hines Page School of International Relations, Johns Hopkins University, formerly American Minister to China, to preside.

Before, however, turning over the meeting to Mr. MacMurray, I would like to say that Mr. MacMurray brings to you this morning not merely theoretical qualifications for the subject of his discussion, but a wisdom begotten of experience, not merely with the matters at hand, but in the country in which they took place. Therefore the theorist has been tempered by the practitioner, or, if you please, the practitioner tempered by theory. The combination is immutable.

### ROUND TABLE CONFERENCE ON THE TREATY SITUATION IN THE FAR EAST

Presiding: John V. A. MACMURRAY, Director, Walter Hines Page School of International Relations, Johns Hopkins University, former American Minister to China.

Mr. MACMURRAY (Presiding). Dr. Scott's more than kind remarks somewhat refresh me as I venture to perform a double function.

At this moment of extreme tension in the relations between China and Japan, it is, I fear, impossible to speak of the treaty situation in the Far East without the appearance of attempting to render a Solomon's judgment and, if not to rule which is right and which is wrong, at any rate to apportion between them the blame for the present deplorable situation. That, however, is not my intention. I propose to address myself not to any such judgment, nor even to any detailed consideration of the treaties which are alleged to have been broken on either side. Lest the purpose of what follows be misunderstood, let me say here that I am one of those who believe that in the immediate situation it is Japan that has put itself most obviously in the wrong. But I frankly do not find myself inspired with any message which might contribute towards a settlement of the critical issues at stake: whereas it does seem to me that a useful service might be done by presenting for the consideration of this representative American group of international lawyers an aspect of the anterior situation which has not received much attention in the current discussions of the crisis—an aspect involving not so much the legal status of the Far Eastern treaties as the attitudes adopted towards

them and the consequent reactions on the part of the governments and peoples concerned. The recent tendency to minimize the binding force of those treaties, and regard them as mere rules of convenience which can justifiably be set aside by a party that finds them irksome, is a phenomenon which deserves attention not only because of its influence upon events already in the past, but because of the danger that it will continue to make more difficult any reconciliation of the conflicting national interests in the Far East.

Those basic treaties which established the terms of intercourse between East and West, in China, in Japan, in Siam, and in Korea, had a peculiar function, namely, the establishment of a régime under which the trade of the West could be carried on with nations not only different in their political and juridical, economic and social institutions and ideas, but unwilling to concede that there could even be, so to speak, a common denominator between their sovereignties and the outer world of barbarians—with nations which cherished a right of aloofness, and regarded the admission of foreign traders as a derogation from their own position which could be accorded only by grace and favor and without any implication of mutual responsibility.

We need not here argue the questions whether the East was wise in seeking to maintain in seclusion the peculiar norms of its ancient civilization, or whether the West was justified in its insistence upon breaking down the barriers to such unrestricted intercourse between peoples as had come to be an axiom of its political and economic thinking. The fact was that there existed an irreconcilability in principle, which while not wholly preventing trade, resulted in its being carried on in conditions of dispute and uncertainty which were a constant irritation, and often a cause of humiliation, to one or the other of the parties. With so fundamental an antagonism of ideas as a background to the relationships that existed and even grew between them, it was inevitable that East and West should sooner or later arrive at some means of practical accommodation—a *modus vivendi* which, while leaving unreconciled the philosophies underlying their several attitudes, should nevertheless provide a workable system of procedure governing their relationships. And so (whether it be for better or for worse, I do not pretend to say, but only that it seems to have been unavoidable) the so-called "Opium War" was fought, between Great Britain and China, to the result that China admitted the foreigner to trade under definite terms that included both privileges and limitations.

The essence of the system that arose out of that beginning consisted in the recognition of the right of foreigners to trade freely, unhampered by monopolies, subject to a fixed tariff of import and export duties, and with the privilege of commuting by a single fixed charge all legal taxes and levies upon commerce; the right of foreigners to reside in designated ports, and to have access to the interior of the country, but not to reside therein; and their

right to be exempt from the processes of Chinese law and amenable only to the jurisdiction of their national authorities. Along with these special features of the system were, of course, provisions for favored-nation treatment, not extraordinary in themselves, but of particular consequence because of their application to the special régime established by the treaties.

Apart from the general reluctance of the Chinese authorities to receive or to deal with foreigners on any basis of mutuality of obligation, there is reason to believe that the Chinese rather welcomed than found onerous or repugnant, at the time, the particular devices by which future intercourse with foreigners was regulated. The establishment of fixed customs duties was in fact an innovation by which the foreign trade was made to contribute larger and more regular revenues than had theretofore been available through haphazard indirect levies upon that trade. The opening of ports, and the subsequent establishment of foreign residential areas or concessions, made possible the extension of foreign trade upon terms which localized, so far as consistent with that extension, the always puzzling contacts between natives and foreigners. And extraterritoriality only carried further the desire of the Chinese, no less than of the foreigners, to minimize those conflicts which arose out of the incompatibilities of manners and usages and juridical conceptions. It was a crude set of makeshifts, frankly devised to alleviate the symptoms without going to the causes of the institutional and psychological divergencies underlying the relationships between East and West. Anomalous and one-sided as it was, I cannot persuade myself that it was either harsh or unreasonable; nor indeed can I imagine other practical terms which would have met the necessities of the situation and made possible the growth of intercourse desired by both the Chinese and the foreign traders. It served its purpose at least tolerably well; and if China and the Orient in general do have occasion to be satisfied with what they have since gained in material and cultural ways through contact with the West, it is to be remembered that that contact was enabled to grow into importance only by virtue of the *modus vivendi* provided by the treaty system.

The régime established in China was soon extended generally throughout the Far East—notably to Japan, under pressure from Perry's "black ships" whose coming has since become an occasion for public celebration among the Japanese, and to Siam, which accepted it without demur. Towards the end of the century, the tide began to turn. By its disciplined acceptance of the new order of ideas, and its singleness and continuity of effort, Japan was enabled so far to reconstruct not only its institutions but its political and economic practices and attitudes, that the original incompatibilities of Eastern and Western principles effectively disappeared; and with them disappeared the necessity for makeshifts to bridge the gap. To a large degree, the same thing has happened in Siam, which since the World War has made treaties of which the effect is to put it in the power of the Siamese Government to dispense whenever it wishes to do so with the last vestiges of

the old system; but that government has proved very cautious in taking advantage of this opportunity until it shall so far have perfected its own legal and judicial arrangements as to justify the change and avoid the conflicts sure to arise out of any imperfect adjustment.

In marked contrast to Japan and Siam, China (the oldest and greatest and proudest representative of Asiatic civilization) has thus far made very little progress towards bringing about such internal conditions as would warrant abolishing in its entirety the *modus vivendi* embodied in the treaty system. Those of us who have faith in the Chinese people, and sympathy with their hopes of developing a national life of their own, are ready enough with explanations and excuses for their failure in this regard. But even though it be less their fault than a misfortune arising out of their immemorial political tradition, the fact remains that the republican and nationalist China of today is scarcely if at all more qualified than was the Empire in the days of the clipper-ship trade, to afford equal protection and to do justice under its laws to foreigners and their interests. Measures of reform have been adopted plentifully—constitutions, codes, decrees and what not: but this season's crop of reforms brings always a reminder that little if any grain was threshed out of the harvest of yesteryear.

Yet, although it be the case that China has thus far made no serious efforts, commensurate with those of Japan and Siam, to rid itself of the occasion for the continuance of the special régime established by the treaties, a consideration of the actualities of the situation cannot stop there: political realism must take account not only of external facts but also of those beliefs or hopes which, though unfounded, have nevertheless so strong a hold upon the minds of peoples or nations as to motivate their conduct. Illusions, and the resultant emotional attitudes, are themselves political realities of the greatest influence in determining the activities of any people in relation to others.

And it is not unnatural that China, immemorial as a people yet scarcely even adolescent as a nation, should since the World War have come to chafe at arrangements deemed to be "unequal," discriminatory and unfairly restrictive, without reflecting that its political administration has given insufficient basis for confidence that greater evils would not follow from the assumption of responsibilities that the nation could not really exercise. Much is to be said for the Chinese contention that the treaty régime is unsatisfactory and subject to abuse. It is both: it never was intended to be more than a stop-gap arrangement, and it has in many instances been shamefully abused by both foreigners and Chinese. But from a long experience of intimate contacts and frank discussion of the subject with Chinese friends, I believe it to be the fact that the admitted inconveniences and abuses of the system are the occasion not so much for actual grievance on the part of the Chinese, as for a rationalization of their feeling that those treaties single them out for opprobrium, and place a stigma of inferiority upon the Chinese people. This con-

viction derives some degree of confirmation from the fact that authoritative spokesmen for the Nationalist group have offered me the proposal that, if we would consent to give up our old treaties, they would find means to assure us of a continuance of the rights accruing to us from those treaties. What irks those Chinese who are politically conscious is (if I am right in my judgment) not the set of legal rights and obligations resulting from the treaties, but rather a feeling of humiliation that the Chinese people, despite their great past of imperial power and cultural supremacy, are now almost alone in being bound to an exceptional type of international relationships—a humiliation that they feel only the more deeply because of the very fact of political backwardness which leads to the continuance of the exceptional régime.

We can understand and be at least tolerant of an emotional reaction which is not, after all, peculiar to the Chinese either collectively or individually: and we can likewise understand and be tolerant of the equally familiar human tendency to place elsewhere the blame for a situation involving hurt to a sensitive self-esteem. But to understand the situation fully, as is due alike to the Chinese and to ourselves in our relationships with them, we should plainly realize that such very human illusions and rationalizations are essential factors in a situation that we vainly attempt to deal with in the merely formal terms of law and logic. Perhaps it was a failure to distinguish between objective facts and the subjective conceptions of those facts in the minds of a people over-wrought by misfortunes and by incitements from interested outside agencies, that the Treaty Powers have found it so difficult to maintain any consistent or coherent policy towards China during the recent years of critical agitation against the treaties. And perhaps their indecision has tended to confirm in the minds of the Chinese a sense of grievance and a rankling determination to vindicate themselves at whatever cost.

At a time within my own experience, shortly after the establishment of the Republic, my Chinese friends (of whom many are in the Nationalist Government of today) were not, of course, content with the treaty system, but patient of it, realizing that its abolition was dependent upon their ability to establish an administration actually competent to deal with foreigners and their interests. Then the entry of China into the World War gave the legal opportunity to denounce the treaties with Germany and Austria-Hungary. The next tableau in the pageant was when, on the morrow of the armistice, soldiers of the French Legation Guard celebrated the victory by an unsuccessful attempt to pull down the archway which the protocol of 1901 had compelled China to erect in expiation of the murder of the German Minister at the outbreak of the Boxer troubles; and when the Diplomatic Body thereupon authorized the Chinese to obliterate the expiatory inscription and erect the arch elsewhere as a sort of *Arc de Triomphe*. The Bolshevik Revolution in Russia afforded occasion for China to withdraw recognition and declare an end to the Russian treaties. At the Peace Conference at Paris, a



somewhat academic set of claims for the revision of the treaties was presented with the appearance of being a mere make-weight in support of the demand for the return of the German rights which Japan had taken over in Shantung. And at the Washington Conference of 1921-1922, those claims were more seriously presented and successfully urged upon the consideration of the Powers as matters requiring re-examination, with a view to determining by common agreement the extent to which they might be relinquished or modified in the light of present conditions. But there was delay, as we recall, in the coming of the Washington treaties into force; and before the Customs Conference and the Commission on Extraterritoriality convened in Peking in 1925, China had, at the prompting and under the guidance of agents of the Third International, undergone a violent emotional crisis of anti-foreign feeling, in which all the bitterness of disappointed hopes for the regeneration of the country, and all the resentment bred by the miseries inflicted upon the people by their own militarists, combined with the always latent antagonism against the intrusions of Western civilization, and made the treaties the focus of an almost fanatical attack. Whereas at first the treaties were challenged and violated with a somewhat self-conscious exultation in the brave wickedness of it (like the character in "The Playboy of the Western World," who made himself a hero by proclaiming, "I'm the man that killed his father with a loy"), a more dangerous and demoralizing stage was reached when the Nationalist authorities came to disregard the treaties as though all obligations under them were at an end.

Much history, some of it significant, had been made during this crisis of which I attempt only to give a sketch of its emotional aspects: the British concessions at Hankow and Kiukiang had been seized by organized mob violence, and the International Settlement at Shanghai had been at least twice threatened; the treaty provisions for the commutation of transit taxes had been ignored, the oil and tobacco companies had been forced to enter into agreements for the payment of heavy special taxes, and surtaxes in frank disregard of treaty stipulations had been imposed upon imports; the basic treaties with Belgium and Japan had been denounced without apparent technical justification, and in the former case China had disdained even to file a reply to Belgium's plea to the World Court.

Despite the provocative attitude of the Chinese towards their existing international obligations, our own government insisted upon adhering to the position enunciated by the delegations of all the Treaty Powers at the Peking Tariff Conference of 1925-6, and actually sought out an opportunity to conclude, in 1928, a treaty relinquishing all previous restrictions upon China's customs tariff. The other Treaty Powers comparatively soon followed this initiative, but only to be confronted with a demand that they recognize the abolition, at a fixed date in the near future, of the extraterritorial rights which still seem to the foreigners so vital a safeguard of their rights and personal security.

It may well be questioned whether the complaisance of the Powers towards the invasion of their treaty rights has not served to weaken the sense of international obligation on China's part, and whether those who gave the Chinese encouragement in the assertion of an individualistic nationalism have not in part incurred responsibility for a course of action which has embittered relations in some quarters and at any rate contributed towards creating an occasion for the conflict which arose last September. For if those Chinese political leaders who sought to make anti-foreignism a basis of national unity — a marching-tune to get Northerner and Southerner, plainsman and seafarer, farmer and merchant, galvanized into a sense of common political purpose such as China has perhaps known only under its greatest emperors — have found condonation and indulgence on the part of the nations whose people have suffered as a result of such a course of stirring up defiance and hatred and violence against the outsider, need we wonder that such a policy was tempted to overreach itself in challenging interests which, although newer and less hallowed by tradition, would not (and indeed could not) consent to extinction?

The old treaties were and are, let us admit, no better than the least dangerous way out of a dilemma for both China and the foreign nations; but as such the Chinese have recognized them for three generations. To countenance and abet the defiance of them has, I fear, had the effect of inciting the Chinese to challenge the *status quo* established within the past generation by a set of more particularistic treaties of which Japan is the prime beneficiary. As to those treaties, we may well be chary of moral judgments. Having lived among both the Chinese and Japanese people, and having tried to understand something of the problems and necessities of both, I confess I cannot, for my part, pretend to any such facility of judgment as would warrant my saying that the one or the other had right on its side as regards the position that Japan had in fact made for itself in South Manchuria up to, say, a year ago. But if only on grounds of mere expediency, it would seem obvious that the rights acquired by Japan under the Peking Treaty of 1905, and those more dubiously established through the treaties of 1915 arising out of the Twenty-one Demands, created at any rate a set of practical political facts which China was ill-advised in attempting to ignore. Yet China did ignore and flout the situation created not only by the 1915 treaties but by those of 1905. I do not marshal proofs of that, because it has not only been self-evident to those who have been in China during recent years, but has been a matter of private boasting by responsible officers of the Manchurian administration. The Chinese, it seems to me, have been deluded by the tolerant sympathy of the world (including Japan under a more liberal administration) into attempting the vain and foolish effort to crowd Japan out of Manchuria by covert and unacknowledged force.

Such a state of facts afforded at least a ready and plausible occasion for action on the part of those Japanese who hold jealously to what, in spite



of the Nine-Power Treaty, they still consider the special interests of Japan in Manchuria. It does not even seem to me very important whether the explosion which set the Japanese Army into action on the night of September 18 was the work of Chinese soldiers or of Japanese *agents provocateurs*; the incident was in any case significant only in that it was the means of bringing to an issue the long covert struggle between the Chinese, and those elements among the Japanese, who were each in their several ways endeavoring to alter the *status quo* in their own favor. The failure of the one party to abide loyally by its obligations had had its part in deciding the other to adopt forceful action, which shortly passed beyond the scope of any original justification as an interposition for the purpose of protecting Japanese lives and interests under conditions of administrative disorder and irresponsibility, and became what seems clearly to be a large-scale policy of military aggression in disregard of the Washington Conference Treaties.

Those treaties and resolutions had embodied a substantial settlement, in the formulation of which the Japanese delegation had coöperated fully, of the relationships that should prevail among the Powers and China itself. The essence of the compact was that the interested Powers should permit China to develop independently a national entity of its own, to that end foregoing any temptation to take advantage of China's weakness, disorganization, and political backwardness and irresponsibility, the recognition of which was implicit in the very nature of the consideration of the affairs of China as an essential element in the deliberations of a conference held for the purpose of limiting armaments among the principal naval Powers. And that compact of self-abnegation, designed as a guaranty expressly applicable to China under conditions known or anticipated, was adopted in contemplation of just such a contingency as has lately arisen. It is for that reason more directly and undebatably in point than the general guaranties provided by the Covenant of the League. Nor was it accepted by any of the signatory Powers with the spirit of dubious acquiescence which marked Japan's ratification of the Pact of Paris, or with the *insouciance* which led the Chinese Government in 1914 to authorize its Minister in Washington to be one of those who signed with Secretary Bryan the first group of conciliation treaties, with the statement that the Peking authorities were not advised as to the text of the treaty but felt quite confident that it was meant for a good purpose and would lead to no harm. The Washington Treaties were rather the result of long and full and frank deliberations, both public and private, incorporating a common conviction of policy and a mutual pledge of the good faith of the interested Powers to refrain from doing or countenancing precisely what Japan appears to have done in the past seven months.

If we may even yet assume that all that has happened in the Three Eastern Provinces and in Shanghai has followed through the impetus of a series of unfortunate and unforeseen circumstances arising out of what was originally intended as a purely defensive action undertaken for the purpose of

safeguarding legitimate rights undermined by the exercise of surreptitious force, then the Japanese Government may still find means to justify its good faith if not the wisdom and poise of those commanders in the field who would appear to have taken action fantastically disproportionate to the objectives in view. In that event, it seems to me, the Washington treaties and resolutions themselves, and the extensive fabric of other treaties of whose existence they implicitly take cognizance, constitute the framework within which a reasonably satisfactory solution of the immediate problems of the Far East may be worked out. No solution, however, can be even temporarily satisfactory, which does not grow out of the whole history of the case, and take honest account of the established rights and interests of the parties.

Quite apart from any question of the procedural mechanisms (such, for example, as the League of Nations) which may prove serviceable in bringing about such a result, it seems to me that the one obvious and indispensable condition for a restoration of tranquility in the Far East is the re-establishment of mutual confidence based upon a scrupulously loyal recognition and observance of established treaty obligations. So homely an appeal to old-fashioned legality and rectitude would be merely trite if it were not that of late years the disposition to give heed to the national aspirations of other peoples, and to offer either applause to those who have proved strong and efficient or sympathy to the weak and suffering, has led us in various ways to countenance loose constructions of the doctrine of *rebus sic stantibus*, and to blur all distinction between what is the legal situation and what we consider would be wise or expedient. I believe that there is in the present Far Eastern situation an opportunity for the exponents of international law to make a real contribution towards understanding and the adjustment of conflicting interests, by hewing to the line in insisting upon the binding force of international obligations, and upon the duty and necessity, for strong and weak alike, of faithfully living up to treaty provisions, however onerous or distasteful, so long as they remain in legal effect. For such loyalty to the pledged word is, among states as among individuals, the basis of confidence: and confidence is the necessary prerequisite to understanding and to peace.

Mr. MacMURRAY (Presiding). Mr. Charles Henry Butler will now speak to us on the nature and interpretation of treaties.

#### TREATIES MADE UNDER DURESS

Mr. CHARLES HENRY BUTLER. My remarks, Mr. Chairman, will only go as far as what the effect of duress may be on a treaty, and whether the obligor party can be released from the obligation by reason of any duress exercised over it in the execution of the treaty in which it is contained.

You have, I think, Mr. Chairman, summed up the whole of my address in the last few words of your very interesting résumé of the situation in the Far East—that no matter how onerous the terms may be to which a signa-

tory nation has agreed, it cannot consider itself relieved from those obligations by reason of the circumstances attendant on the execution of the instrument.

Of course, duress which, according to the dictionary, is "constraint illegally exercised by force over a person to perform some act," is known in law, although it is generally enforceable only in equity. A contract extorted by duress may be set aside for that reason by a court of competent jurisdiction on proof of fact sustaining the contention.

Even if we do agree with our worthy President that there must be a single standard of morality for individuals and nations, as we heard him expound so ably last night, can we extend any such rule of law to obligations created by a solemn treaty, executed in due form, and on which the rights of so many people, nations and conditions depend? There are many differences between treaty obligations. Even as one star, whether in Heaven or in Hollywood, differs from another in glory, so the circumstances under which treaties are negotiated and obligations are created differ from each other.

There might be absolute impossibility of performance of an assumed obligation. That would hardly be avoided by duress, but it might be by impossibility of performance. For instance, if a certain section of the Versailles Treaty had required Germany, instead of England, to return the head of a certain deceased Sultan which was hard to find, and suppose they had never found it, could Germany have been relieved of the obligation because of duress used to force her to sign the treaty? She might possibly have been relieved for impracticability of performance, but I hardly think for duress.

In speaking of duress as applied to treaties, naturally treaties of peace are the first that occur to us. "Sign on the dotted line." Duress with a capital "D", with the firing squad ready to open fire, without even waiting for the sun to rise,—execution suspended merely to give the victors time to ascertain how much they can get, and how soon they can get it. It would be foolish to say that such a treaty, because it was executed by duress, was not binding upon the parties who signed that treaty in order to avoid national extinction.

In this round table discussion the question is a narrow one and is simply whether a nation entering into a compact with another nation to obtain whatever advantage the execution of that compact may afford, or to avoid the dangers of its non-execution, can avoid those obligations for duress under any recognized principles of international law. I do not think so. Do not misunderstand me. I do not intend to say that a treaty executed under duress cannot be subject to redress in some manner. I am talking purely from a juridical standpoint as to whether, if there was a court of competent jurisdiction, and such a claim were made, could that court grant the relief demand? I do not see how the cause of the world or the general application

of international law and justice could be in any way helped by any court being clothed with such authority.

One instance which took place long ago, in which a treaty obtained by deception was held not to be voidable, can be cited. A band of travel-worn and hungry travellers arrived in the camp of the Children of Israel, just before they entered into the land flowing with milk and honey, and put one over on that old war-horse, Joshua. They made a treaty with him on the basis that they had come from a far off country. Joshua said, "We cannot make any treaty with our immediate neighbors to spare them but, of course, if you have come from a-far, as your dirty and worn out garments and your musty bread seem to indicate, we will make a treaty and allow you to live." It took them only three days to find out that this weary band of strangers, instead of coming from a far country, had come, so to speak, just from the other side of the Potomac. Then the question came up what to do about it; and had Joshua and the princes not intervened, and had there been any available lamp-posts, I think it would have gone hard with those ambassadors. Times have changed but little. The people still murmur, as the Israelites did, against the princes. But Joshua said, "No, we have made a treaty and we must stand by it." So the treaty stood. However, Joshua said, "we can construe this treaty as we wish. We have agreed not to kill you, but you can draw water and hew wood for us the rest of your days." And so the treaty stood and stands, as the narrative says, "unto this day."

I do not see how I can help this round table discussion much, except to refer to a few instances where this question has been raised, and some things that have been said about it.

Vattel says it would be ridiculous of a nation to try to relieve itself of the obligations of a treaty of peace because executed by force. If, on the other hand, during these negotiations an armed force was called into the council chamber by one set of plenipotentiaries, who threatened to shoot up the other plenipotentiaries unless they signed the treaty immediately, such a procedure might vitiate the treaty. But Phillimore qualifies this by saying that the threat should be of such a kind as would influence a reasonable man. Any man—or woman for that matter—here present can determine what the effect would be of such a body arriving with machine guns and saying "Adopt these resolutions, or we will shoot," and how a reasonable man or woman would vote under those circumstances—

That is to say, a treaty induced by fraud or force upon the negotiators might be voidable for duress, but it would not be voidable for duress or even deceit exercised upon the contracting party itself. For instance, Phillipson says there were a great many instances where people were justified in resisting obligations imposed in treaties executed under duress. They are stated by Phillipson at great length and by others, and one of our fellow members, Charles Cheney Hyde, has expressed his views on that subject in his recent *magnum opus*, for which we are all profoundly grateful. I think none of us

have read it through, but I think we have all had occasion to examine it. We can all rely on what he says: "The motives which impel a state as a whole to exercise its agreement-making powers in such way as to accept a treaty are not deemed to affect the validity of the agreement. That is, a desire to avoid unpleasant consequences will induce it to agree to terms of peace. The validity of the agreement is not impaired by the reasons which prompted acquiescence."

But, Hyde, even as all writers on these subjects do, hedges a little bit, and to some extent denounces validity of territorial accessions made under threats of war, in the presence of an armed force. Practically you are as much under duress when the other party says, "We will shoot you up," as you are when it says, "We will only stop shooting on condition you make this treaty."

The summary of the whole matter seems to be that a treaty made under duress does not appear to many of the best minds who have written heretofore on the subject to be voidable because of duress. I think our worthy presiding officer practically affirmed that. It is not impossible, however, for an unjust treaty, forced upon a weaker nation, to be rectified by the intervention of Powers—as was done in the San Stefano case. There was a treaty in which Russia practically disemboweled Turkey, but the Powers of Europe got together, and having agreed it was for their best interest that Turkey be not disemboweled, forced Russia to make substantial concessions. There have been many such occasions in which duress has been exercised upon a victorious party by third parties. There is a story that something was whispered during the Portsmouth Conference from Washington to Tokio, and the Japanese demands were somewhat diminished. Whether or not you would call the fact that President Roosevelt intimated something ought to be done, could be called duress or not, I do not know. Some people might think so.

I find duress is a verb in the Oxford Dictionary. France was duressed into giving up Alsace-Lorraine. Germany was duressed into giving it back, but the local people were never affected and no question of the validity of the cessions has ever arisen. Just picture to yourself, if duress were a proper defense to obligations created by a treaty, as to who could raise it, and whether or not a national could. It has been tried unsuccessfully to raise the invalidity of a treaty because of its execution under improper motives.

I think the conclusion of the whole matter is that a person who makes a treaty has got to stand by it, unless in some way or another, other than in a court of law, it can manage to regain its independence of the obligations so made.

Mr. MACMURRAY (Presiding). You will hear further on this subject from Mr. Edgar Turlington, known, I suppose, to many of us as a former member of the Department of State, now lecturer on international law at Clark University.



Mr. EDGAR TURLINGTON. I can hardly hope to throw much additional light on the subject that was set for our consideration after the very able discussion by Mr. Butler. In fact, I think I may have to leave out some things that I had set down because he has said them much better than I had intended to say them. At least, than I had actually set them down.

I think Mr. Butler has made sufficiently clear the traditional answer to the question whether duress, military pressure, pressure of any kind, applied in connection with negotiations, or even in connection with ratification, makes a treaty null or voidable. The traditional answer was stated by Wheaton, I suppose, as well as anybody, to the effect that the welfare of society, that being the standard—the welfare of society, requires that treaties must be observed. The old phrase we know, *pacta sunt servanda*. Another way of saying it, if I may go back to the Scriptures also, is "The just man sweareth to his own hurt and changeth not." But the danger of this implied analogy between treaties and private contracts has been pointed out, by Professor Hudson among others. There is a great danger in attempting to transfer to the field of public law the conceptions of private law. It might almost be said, reverting to the remarks of yesterday evening, that there is a danger in trying to transfer to the field of public relations and of international relations the rules of morality that are ordinarily considered binding among individuals.

There is another answer to which Mr. Butler has referred, and he has given one of the forms in which that answer is given. It has recently been rephrased by Dr. Charles Dupuis, at The Hague Academy of International Law. I think it is interesting to quote Dr. Dupuis very briefly, for a special reason which I will indicate after I have quoted him. He says:

The state which accepts a treaty under the pressure of force . . . consents with knowledge of the facts in order to gain relief from force, to avoid a worse evil, or to obtain some advantage which it would lose by refusal. Though force has a bearing on the decision, it is not the only element in that decision. If it did not consent, it would remain subject to force and to force alone . . . and would regain its liberty of action upon the disappearance of the force to which it was subjected. But the consent introduces a new element, which is not destroyed by the removal of the force.

As I said, that indicates a somewhat dangerous analogy to the private law of contract. It overemphasizes the free consensus of parties, which we have been told is the fundamental condition of the validity of contracts in private law, but which is not essential in international law. But it has a special and peculiar advantage for American students because it precisely corresponds to the events which occurred in the neighboring Republics of Haiti and Santo Domingo in 1915 and 1916.

Haiti, you will remember, under pressure—which is sometimes alleged to have included intimidation of the agents of Haiti, not only the executive agents, but the members of the Senate,—Haiti, under such pressure, con-



cluded and ratified a treaty giving the United States very exclusive rights. But the Dominican Republic under the same kind of pressure refused to sign the treaty and remained subject to force and to force alone. The United States later adopted substantially the same measures in each country, but in the case of Santo Domingo the absence of a treaty, coupled with other circumstances, led to the termination of those measures several years earlier than they were terminated in Haiti, where the treaty embodied the consent of the Haitians to what we were preparing to do, and what we were going to do whether they liked it or not, whether they consented or not. I am tempted to say that the moral in this case would seem to be that when you are confronted by a tenderhearted executioner, who cannot sleep if his victims do not confess, it is wiser not to confess.

In this connection, and with full realization of the danger I have already indicated of drawing analogies between private law and international law, I would like to suggest another analogy. I would like to suggest that the treaty we forced upon Haiti in 1915 has many of the characteristics of a judicial sentence. We have heard of treaties as contracts and treaties as legislation. Why not treaties as judgments? Treaties of peace are judgments following trial by battle. Treaties for the arbitration of claims, as in Venezuela in 1903, and treaties for the appointment of advisers and other special advantages, as in Haiti in 1915 and China in 1915 (did Haiti obscure our vision of China in 1915?), treaties such as these may be validly made under pressure by states exercising compulsion in the name of the law, and such treaties may likewise be regarded as in the nature of judgments. The embarrassment of the judge on account of acting in his own cause is alleviated by the participation of the defendant in the drafting of the judgment, and this participation is also a salve to the dignity of the defendant, who has, after all, to go in and out still among his people, and save his face in one way or another. Sometimes he saves his face by explaining to his people that he had to do it, and sometimes he saves his face by saying, "We compromised, we agreed. Here is a treaty as evidence of our compromise."

But the principal answer, as I tried to indicate a moment ago, to the question whether treaties must be observed, is that the welfare of society demands their observance. That statement rather indicates that the welfare of society may be deemed at some time in the future not to demand the observance of treaties.

If the criterion is the welfare of society, we have, at a given moment, to consider what the welfare of society requires, and there is a note of hope which is not overlooked in that kind of statement by some of the recent critics of the rule that treaties must be observed. Dr. Verdross, at The Hague Academy of International Law in 1929, made a statement to the effect that a new theory now is emerging or is about to emerge, that a new theory now exists, a new doctrine now exists. I think he got a little ahead of the procession perhaps, but here is what he says: "The use of force against the con-

tracting state cannot be tolerated in international law except in so far as it is legitimate force, that is to say, a measure permitted by international law in order to make right prevail."

This statement has one great advantage: it would not necessarily be questioned by any of the states which have imposed treaties by force on other states. So much depends on who is the judge of what is right. The authorities whom Professor Verdross calls to the support of his statement are very imposing. They may perhaps prove more than he asks them to prove.

Grotius, although stating the general rule as to the irrelevance of duress to the question of the validity of treaties, believes that if a promise was occasioned by "an unjust fear" (whatever that may mean), the promisee is bound to liberate the promisor if the promisor so desires. Apparently it is not taken for granted that the promisor will always desire to be released. It is always possible, of course, that if the treaty is thrown out, force will again be used and a new situation will be introduced.

Vattel shows sympathy, really quite indignant sympathy, for "the plea of constraint against forced submission to terms which are equally contrary to justice and to all duties of humanity."

G. F. de Martens is "quite explicit in stating that force illegitimately used confers no right."

Klüber maintains that a treaty is void "if brought about by unjust compulsion," and our contemporary and colleague, Professor Fenwick, declares that an agreement resulting from force and intimidation does not necessarily create "the obligation of good faith."

I welcome the color given by these great names to my suggestion that some treaties may be regarded as closely, and dangerously, analogous to judgments in the name of the law. I must confess, however, as does Dr. Lauterpacht, who cites some of the same authorities, that a sufficient case does not appear to be made out for the view that the established rule has already been modified. On the other hand, it is of course true, as pointed out by Dr. Dupuis, that treaties imposed by force are a good deal like laws imposed by force. Mr. Butler has indicated this too. But perhaps I may repeat what Dr. Dupuis says:

Whether they are just or unjust, reasonable or imprudent, their authority remains weak and precarious in proportion as their justice, their convenience, or their usefulness is contested by states still sufficiently powerful to be able in the more or less near future to destroy them by resort to arms.

I have not discussed several matters which I believe are quite pertinent and which perhaps will be discussed by other members of our round table. I have not discussed the checks which may be applied to unreasonable demands through the mediation of third parties at the time the demands are made. You will remember what happened in Venezuela on two occasions, in 1895 and 1902. Apparently some great Powers were inclined to ignore

the possibility of arbitration and some urgent representations were made to those parties in behalf of the United States. There you have an example of the mediation of third parties at the time the demands were made, and that is a check. The same thing of course might possibly have happened on the part of some other great Power when we made our special demands upon Haiti in 1915.

I have not described the manner in which wrongs may be redressed, as Emerson says, "in silence and certainty," over a long period of years, as happened with reference to the partitioning of Poland and with reference to Alsace-Lorraine. I may recall just at this moment that the partitioning of Poland was brought about under a treaty in which the old fashioned duress appears to have existed. In that case a considerable number of soldiers were stationed at the doors in which the Diet of Poland was in session, and the members of the Diet were informed that they could choose between ratification of the treaty and the loss of their lives. But that treaty was legally in force for awhile, apparently, actually in force at any rate. Nevertheless, over a period of many years, in silence and certainty, that wrong could be redressed, and it was in that case redressed.

I hesitate to discuss the possibility of the revision of treaties at the desire, if it is vociferously enough stated, of a contracting party that thinks it has been injured. Such revision has been made, as I understand. Mr. MacMurray and others can tell us better about that. Such revision has been made to some extent in respect to the Chinese treaties of 1915. It has been made recently with respect to the Haitian treaty of 1915, and some qualifications, at any rate, have been made upon the extreme obligations accepted by Germany in the Treaty of Versailles.

There you seem to get more or less what Grotius was thinking about: the promisee, if he has subjected the promisor to unjust fear, may owe a kind of duty, I suppose a moral duty, to revise the treaty if the promisor so desires.

I may mention one other thing that I believe Mr. Butler did not mention: the report of the Commission of Jurists upon the application of Bolivia to the League of Nations in 1921. It would seem that the best authority, at the present time at any rate, is represented by this group of jurists, and their report in 1921 is to the effect that the Assembly of the League of Nations has no authority whatever to revise treaties, and that such matters are solely within the competency of the contracting parties. There appears to be no immediate prospect of relief through any agency of the League, but it is of course possible that the time may come, as indicated in the recent editions of Oppenheim and Hall, the time may come when a permanent commission of the League of Nations may be authorized to examine and report on all charges that treaties were made under improper pressure, or when the World Court may be vested with jurisdiction to revise such treaties in the superior interest of international society.

The controlling consideration will always be, it appears, the superior interest of international society, and whatever the welfare of international society requires, will be done with respect to treaties, whether those treaties are contracts or legislation or judgments.

Mr. MACMURRAY (Presiding). We will proceed now to a discussion of the doctrine of *rebus sic stantibus*, and may we congratulate ourselves that this subject will be opened by Mr. William C. Dennis, President of Earlham College, actually better known to most of us here, I suppose, as a former Solicitor for the Department of State.

#### THE DOCTRINE OF REBUS SIC STANTIBUS

Mr. WILLIAM C. DENNIS. Mr. Chairman, ladies and gentlemen: When I approach any topic connected with the Far East, I always feel reminded of, and usually say that I feel like, Mr. Justice Hughes did when campaigning for the presidency in 1916. He said that as a judge he tried to be 100 per cent. a judge, and as a candidate he tried to be 100 per cent. a candidate. I do not think anybody who has ever had any official relations with the Far East ought to speak on that subject without it being clearly in the minds of his audience that he has had such relations. I had for two years the relation of legal adviser to the Chinese Government, two years of extraordinary interest to me, in which I came to have the greatest confidence, respect and affection for a great people struggling to be free and to assume its proper place among the nations of the world. Since I have returned from China I have not been in the service of the Chinese Government, but I cannot pretend that I can get rid of my past environment any more than anybody else can get rid of a part of his life. I have always sincerely hoped, however, that that did not make me lose my sense of justice or have any but the kindest feelings for any other nation, and particularly for the Japanese nation, with whose fortunes the fortunes of China are so inextricably interwoven. Those two great nations must, if they are to achieve their destiny, live together in peace and friendship. What is good for one of them permanently is good for the other permanently, and while I believe we ought to discuss objectively the practical situations which arise, even in an assembly of this kind (because otherwise I do not see that we have any particular function, unless we apply our law such as it is to the facts), yet I believe that this objective discussion ought to be entirely consistent with genuine good will for those two great people.

Now, it seems to me that, after all, our program today calls for comparatively little law. I have been confirmed in that view as I have listened to these very able papers which have been read this morning. There is no serious doubt as a matter of law that treaties must be respected and complied with. There is no serious doubt, I take it, that duress applied to a nation, unlike duress applied to an individual, does not excuse it from carrying out

all treaty obligations. In the same way, I do not think there is any great doubt about the law concerning the doctrine of *rebus sic stantibus*, although a recent authority in the British Year Book of International Law has suggested that it is very doubtful whether there is such a doctrine enshrined in international law, and if so, that it is doubtful what its limits are. Yet I think that even a cursory examination of the authorities, and a consideration of the absolute necessities of the case, bring one very quickly to the substantial conviction that the doctrine is an essential, and at the same time an exceedingly dangerous one.

Pitt Cobbett states the doctrine substantially thus: that the change in conditions which must arise in order to relieve a nation from its engagements must go "to the very foundation of the engagement." Oppenheim says there must be "a vital change in circumstances." Hall adds the idea that the new order of things invoked to release a state from an agreement must not have been within the contemplation of the parties at the time the treaty was signed. I think those three references contain the gist of the authorities from Grotius down.

An agreement, in the nature of things, cannot be absolutely unchangeable, forever. If there is a fundamental, essential change in the circumstances, not specifically contemplated by the parties, or inferentially or reasonably within their expectation, then I submit that in the nature of things they are released from their obligations. That I think is a sound general statement of the law, but obviously that law draws a very wavy line. It is like "due process of law," like a thousand other rules of law,—dangerous to be sure, but there is no hard and fast plumb-line that can be dropped. Interpretation of the rule is a matter of good faith, of argument, of reason, but the essence is there, I think. If two nations make an agreement, and then fundamental circumstances change in a way that they did not expect and could not reasonably expect, then they may be released from their obligations. Of course, the difficulty is that there is no court to release them. Up to the present time we have no organized international society which has a tribunal before which any one of these nations can go as a matter of course to ascertain whether or not it ought to be released.

The article of the League of Nations Covenant to which reference has already been made here, suggests that in the future we may secure some such forum. The article of the Covenant provides: "The Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world" (Article 19). That, I think, goes much further than any legal rule, much further than the doctrine of *rebus sic stantibus*. The article lays down political rules, "inapplicable" and "endanger the peace of the world." That is a very large order; and yet it suggests that there must be sometime some tribunal to which this question can be put, so that it may not be left, as it must be now,



like any other question of international law, in the first instance to the decision of the interested nations.

I cannot but suggest, incidentally, that the mere fact that the League did not see fit to operate when Bolivia approached it in regard to the Tacna-Arica question under this article, in view of all the peculiar circumstances of that case, does not seem to me to show that in the future there may not be very great possibilities for fortunate developments out of this Article 19 of the Covenant of the League. The circumstances were such that no great advantage could be expected from that application at the particular time at which it was made.

Now, we do not have such a tribunal to which we can go. We are left to apply this very vague doctrine of *rebus sic stantibus* as best we may. What does it really mean in practice? It certainly does not mean that nations can get rid of a bad bargain, any more than when a man buys July wheat in the wheat pit and it goes down, or sells stock short and it goes up, he can be relieved of that obligation. I believe Congress is now investigating the question of short selling, and trying to find out what, if anything, ought to be done about it. But, certainly, if a nation makes a bad bargain, with its eyes open, international law does not provide for releasing it.

I may perhaps refer to two of the most interesting cases of the last half century which illustrate the point I am attempting to make. One of them arose between the United States and Great Britain as respects the Clayton-Bulwer Treaty and the other about Russia's obligations as respects the Black Sea. They were both cases where a nation simply wanted to be relieved of what it considered a bad bargain.

When we made the Clayton-Bulwer Treaty in 1850 it looked to us as though we had made a good bargain. At that time the strength of the United States was relatively much less than it is today; the strength of Great Britain in Central America was relatively much greater. Thirty years later we saw the error of our ways and argued for a season, a year or so, that that treaty had become inapplicable. Then we dropped the matter, and in 1896 Secretary Olney, in a very frank, courageous memorandum, advised the President that that contention on our part was entirely too late, was inconsistent with the record, and unsubstantiated by the facts. The time had come when we had good reasons to want to get rid of that treaty as embarrassing and disadvantageous, but the results of our bargain were within the reasonable contemplation of the parties, and we were bound by it. Our only redress was to go to Great Britain, as we did, and ask in a reasonable way for the revision of the treaty. I think that case is a splendid illustration of a situation when the doctrine of *rebus sic stantibus* does not apply, and when it may yet be quite reasonable to ask for a revision of the treaty, and when Article 19 of the Covenant of the League might well apply.

A somewhat similar situation arose about the Black Sea. Russia was compelled to agree not to maintain a fleet on the Black Sea at the conclusion



of the Crimean War. In 1870, when France was prostrate and it was perfectly obvious there was no force in being to compel obedience to that treaty, Russia discovered that the treaty ought not longer to be considered applicable. I submit that in that case no change had taken place which was not within the contemplation of the parties. It was simply that Russia saw an opportunity. So after a certain amount of red tape, a certain amount of resolving that treaties were always to be regarded by those who had attached their signatures to them, the nations of the world released Russia from the obligation of that treaty. That may have been a proper case for revision under Article 19 of the League Covenant, but was clearly not a case for the application of the doctrine of *rebus sic stantibus*.

Most of the cases, nearly all the cases, where it is sought to invoke this doctrine are equally unworthy and the doctrine is equally inapplicable; and I submit that the very latest case before the world where apparently it is desired to invoke this doctrine is a case in point, namely, the question of the continued applicability of the Nine Power Treaty, the Covenant of the League of Nations, and the Kellogg Pact as respects China, and the applicability of the various declarations regarding the open door in China which have been made in aid of one or other of those documents.

When Secretary Stimson issued his warning to China and Japan on January 7, saying in substance that the United States did not propose, so far as its rights were concerned, to be bound either by any *de facto* situation or any agreement which might be brought about in contravention of its rights under those treaties, the answer made in one or another document by the Japanese Government was, in substance, that these treaties were either inapplicable or, if applicable, at any rate to be interpreted in the light of very changed circumstances; and the plain intimation runs between the lines that the treaties are really, in the sense in which they were originally written, no longer applicable. In the formal reply of the Japanese Government to the American note, that government said:

It may be added that the treaties which relate to China must necessarily be applied with due regard to the state of affairs from time to time prevailing in that country; and that the present unsettled and distracted state of China is not what was in the contemplation of the high contracting parties at the time of the treaty at Washington. It was certainly not satisfactory then; but it did not display that disunion and those antagonisms which it does today. This cannot affect the binding character of the stipulations of treaties; but it may in material respects modify their application since they must necessarily be applied with reference to the state of facts as they exist.

Then, in the statement of the Japanese delegate on February 19 before the League of Nations, he challenged the right of China to be considered an organized government in the sense of the League Covenant, and in a further statement made by the Japanese Government in response to the plea of the members of the Council of the League, the same position was taken, and it

has been taken in substance in various statements issued by spokesmen in behalf of the Japanese Government.

Now, I submit that there is no reasonable basis for invoking the doctrine of *rebus sic stantibus* in connection with any of these treaties in question. True, as Chief Justice Holmes said, there may be a difference in degree so marked that it amounts to a difference in kind. There might conceivably be such an increase in disorder and chaos in China as to create a vitally different set of circumstances, but, as a matter of fact, it is submitted that there has not been any such change as that. This whole question is very largely a question of fact. It is simply a question of examining the record; and the record in the case of China means a record of some four or five thousand years, as well as the record of the last twenty years, or the last ten years, to which reference is frequently made, to see whether or not there has been any such vital and fundamental change as to create a totally different set of circumstances not within the contemplation of the parties to the treaties. It would hardly be worth while to go into that record but for the fact that this suggestion has been made on behalf of a great nation, and must therefore be treated with the respect due to its source. Briefly what are the facts?

I myself went out to China at the close of the year 1917, and I can speak with some knowledge about the actual facts and circumstances for two years very shortly preceding the negotiation of the Washington treaties, at a time when I had the great pleasure of being associated with Mr. MacMurray and several of the other prominent men who are taking part in this discussion.

The first thing I found out when I got out there was that, in order to deliver a message to that very distinguished statesman Wu Ting Fang, who happened to be down in Canton, I had to cross the lines of two belligerents. I therefore had to invoke the good offices of the American Consul to deliver my letter. China was divided then, as it has been divided practically all the time since the day when Yuan Shih-kai first broke with Parliament. North and South were at war. One of the southern provinces of China was being devastated in a perfectly ruthless way by an army representing the government which I had the honor to serve.

At that time the great question before China was the so-called "constitutional question." The first question I was called upon to answer was to advise the President about the "constitutional question," which arose out of a very interesting and complicated state of facts which raised the question whether or not there was any legal parliament in China, and if so, which one of the two parliaments then contesting for the honor was the legal parliament. I worried over it for several weeks and advised the President there was not any legal parliament in China. The President, doubtless because it fitted in with his purposes, transmitted my opinion to the Peking Parliament which was then sitting; and that same day he endeavored to go from Peking to Nanking to visit his lieutenant, Li Shun, who was in control there; he did not succeed because the sublimated brigand, Ni Shih-chung, then overlord

of the Province of Anhwei, had, wholly illegally, extended his jurisdiction over the Tientsin-Pukow Railway, and he met President Feng Kuo-chang, who was advised to visit him as a matter of courtesy, and ordered him back to Peking. I have often believed that the history of China might have been changed if the President had insisted on going on, and, if necessary, fighting his way through; but he did not. The authority of the Peking government at that time hardly extended beyond the walls of the city.

I was subsequently sent on practically a diplomatic mission to this same Li Shun, the Governor of Nanking, and had the pleasure of walking around the walls, in various nooks and corners and seeing the encampment of a part of his private army of some thousands of men with which he maintained his substantially independent authority in Nanking. Very shortly after that came the movement of Wu Pei-fu when he moved up to Peking and drove out the so-called An-fu government, which for two years had run riot and wasted the substance of the country in a most scandalous way, apparently in the interest, to a certain extent, of a foreign Power.

That government, and the government which followed that, and those which followed in kaleidoscopic continuation, were the governments which existed at and about the time of the Washington Conference. The situation was just the same then as it is now, except that now the situation is, in a sense, I should say, more hopeful. It is certainly more hopeful in the sense intended when someone said a few years ago that "every day brings the solution of the Mexican situation that much closer." In the same way, every day brings the situation in China that much closer solution! We cannot tell how long it will take, but "be glad you suffer; it is a good sign you are alive." It is also a sign that the Washington Conference treaties, the open door policy which was born in Boxer days, that all these treaties have been made in contemplation of the very set of circumstances which now confronts us, as pointed out by Secretary Stimson in his letter to Senator Borah. Moreover, they have been made in the light of five thousand years of Chinese history. We are dealing, of course, only with a period of ten years since the treaty, but it is pertinent to remember that the fall of nearly every dynasty in China for the last 4,000 years has been followed by a period of confusion. After the Chu dynasty, there was a period of 250 years called the "Era of Contending States." After the "Han" there followed the "Era of the Three Kingdoms," a period famed in the great Chinese historical novel *San Kuo*, a period wherein for 350 years the Chinese people wrought out its salvation and finally established a new government. Each time after these periods of confusion, a new and better government has been established. It was after the period of the Three Kingdoms that there came one of the greatest eras of Chinese history, when China was undoubtedly for the moment the greatest, the strongest country in the whole world.

This period of twenty years which we have had since the revolution of

1911 is just about the same length as the period which followed the overthrow of the Mings. It took China twenty years then to settle down. Really, under all the circumstances, China has made rapid progress in these twenty years, and we have every reason to look forward with hope and encouragement to the rise of a great, peaceful nation after this period of confusion, just as in every similar period for the past four or five thousand years, a new and stronger government has arisen under the same circumstances. And I submit that in those circumstances the suggestion that these treaties were not made in contemplation of the very situation which they were intended to alleviate and, so far as possible, to prevent, seems to me to call for that observation which Dr. Jordan made after he heard the British argument on the life of the fur seal in the Behring Sea arbitration. He said that what was necessary was not a legal argument, but "someone who knew how to laugh in the right place."

Mr. MacMURRAY (Presiding). The discussion of this aspect of the situation will be continued by Professor Chamberlain, Professor of Public Law at Columbia University.

Professor JOSEPH P. CHAMBERLAIN. Fellow members of the American Society of International Law: It would almost seem to be unnecessary for me to continue this discussion, with the very elaborate statements you have heard, particularly from the chairman and from Mr. Dennis, but there are one or two points which I think it may be worth while for me to enlarge upon now that I have the floor.

The first thing that I want to emphasize is the point which Mr. Turlington developed, the very great danger of applying principles of national law to international law, arising from the fact of the very great difference of the organization of national and international society.

Let us take this case of *rebus sic stantibus*. There are certain principles in national law that are quite akin to the principle of *rebus sic stantibus* in international law, but the very great difference is that these principles are applied, not at the will of the individual, but by the judge who takes into consideration both the arguments for and the arguments against the application of the principle and the modification of the contract in consequence of the application of the principle. Therefore, while the principle might very well be applied and might very well be adopted by an organization of international society similar to that of national society, it is with very grave doubt that we must look upon its application where it is the right of one of the parties to decide upon complicated questions of law and fact which are involved in determining the intention of the parties who made the original agreement,—not what was his intention alone, but what was the intention of the other party. It is also a question of fact, whether there has been a sufficient change since the treaty took effect, to warrant the application of the principle.

There are in the case of the Nine-Power Pact, eight other parties, and consequently a question of fact principally as to whether or not there has been such a change in circumstances and conditions since this treaty was signed that it is obvious that it never would have been signed had those conditions been contemplated.

It is important that we should realize that we are not here facing the application of a principle of law to a well recognized state of facts. If there is such a principle of law, depends entirely in its application upon the facts, and if we allow one state at its will to decide whether or not the rule shall be applied to a convention or treaty, what we are really doing is to permit that state to decide what was the intent of the parties at the time the treaty was drawn, and furthermore what are the facts that have occurred since the treaty was drawn up which warranted its being modified or absolutely thrown into the discard.

The writers on international law observe those circumstances. They very widely agree that there must be some such principle included in international law, but they all agree that it never yet has been applied by any international court or tribunal, and it never yet has been consented to by both parties to a transaction. It, therefore, appears to me to be of very first importance that we take into consideration the question of how the principle is to be applied if it is accepted as a principle at all.

I need not go into the question of what the principle is, as that has been already fully covered, but I think that one can almost say that the principle of *rebus sic stantibus* merely means this, that a Power which considers itself aggrieved by the continuance of a treaty, may ask for the modification of the treaty. It gives that Power the right, as Mr. Turlington quoted the father of international law to have said, to apply to the other signatory to have it changed, and it would make a very improper act the refusal of the other party to consider the question of whether the change should be allowed.

Now, let us apply that to the question of the Nine-Power Treaty. There you have a multipartite treaty. You have a much more difficult situation with the application of the principle than where you have a treaty between two parties. For not only must the intention of the various parties who signed the treaty be determined by the opinions, in this case, of eight Powers other than the one trying to put in effect the principle, but that government must also persuade the eight Powers that a situation has arisen since the signature which makes it fair that the treaty should be amended. It is entitled, however, to request the other parties to the agreement to consent to a modification of the agreement, and where a proper case can be made out, it has a right to the sympathetic consideration of its position.

Let me then for just a moment take up the question of what was the intention of the parties at the time of the making of the treaty, and, secondly, what has been the experience under the treaty. It is idle for me to add to what Mr. MacMurray and Mr. Dennis have said as to the intention of the



parties when they signed the treaty. I only want to add one point, which I fear was not quite enough insisted on, that the parties to the treaty were not considering solely the interest of China. They were considering their own interests, their material interests in the trade of the East, which was the principle of the open door, and the very great importance to them that there should be peace in the Far East.

Any attack upon the integrity, administrative or territorial, of China implied a grave danger to the peace of the East, as to which there had been ample evidence in the past, and it was therefore their plain intention to protect themselves against the danger of possible war in the East, a war that would certainly extend far beyond the East, and also to protect their own trade in the East, as well as their sympathetic feeling for the Republic of China, that moved the Powers to take action.

Have those considerations changed at the present time? Let me call your attention to the state of trade with China during the last ten years. Has the situation gotten so much worse or changed so much since 1922 that on that ground a request might be made that the treaty be modified? That is, have conditions in China, political or economic, become so chaotic and so harmful to the legitimate trade of the world that it is evident that the method of carrying on that trade under Chinese sovereignty proposed at the time of the Nine-Power Treaty, has failed and the treaty should therefore be altered?

In fact, we notice that there has been not a decrease of foreign trade with China, but exactly the contrary. There has been a very great increase in the trade of foreign countries with China, through the port of Shanghai, as well as Manchuria, and that development has continued even during the period of disorders which have been so clearly described to you.

That trade was of course seriously affected by famine in the country, by revolution, by flood, but nevertheless the country is so large, and the social organization of the Chinese people, of which the chairman spoke, is so strong, that trade was able to go ahead in greater volume than before 1922. I submit that so far as the question of the trade of foreign nations with China is concerned, the system adopted in 1922 has not been a failure, but a success, and no argument for a change of that treaty or the system laid down by it, could successfully be based on the argument that foreign trade with the country has been injured. Let me add here that the Japanese have shared more than any other country in that increase in trade. They have profited more, up to the recent trouble, by the situation provided for in 1922 than has any other of the eight Powers.

Again we should notice the increase in the investments in China, particularly the investments of foreigners. I want to call your attention to the investments of the Japanese in cotton factories in China, principally around Shanghai and in the coast cities. Spindles, paid for and owned by Japanese manufacturers, have increased from 330,000 in 1918, to 1,630,000 in the year



of 1931. This is only part of the increase in investments on the part of the Japanese and other foreigners in the country, and it seems to me to add to the evidence that the plan laid down in 1922 for the administrative integrity of China has not been a failure, and that on the ground of the disorder in China endangering the legitimate business interests of the foreign Powers in the country, the decision in 1922 at Washington cannot successfully be attacked.

Let us consider, too, what has been the attitude of the Powers, the other signatories of the treaty of 1922, to the situation in China?

Mr. Dennis and our chairman have shown that the situation has improved somewhat, I believe, but that again is a matter of opinion. But the foreign Powers themselves have shown a satisfaction with the agreement of 1922, in a broad way, and an intention to go ahead and permit China to continue development under the provisions of that agreement. They have shown it by the treaties and conventions which they have concluded with the different governments of China, notably with the present Nationalist Government, and especially, and most significantly, by the convention which the chairman referred to, returning to the Government of China their right to freedom of tariff. Even the Japanese Government has joined with the others in restoring to China, though with conditions, her tariff freedom, as late as in May, 1930. This appears to me to be very persuasive as to the opinion which the responsible officers of the governments have as to whether or not under the doctrine of *rebus sic stantibus* there should be a decided change in the present treaty situation in China.

It seems to me, therefore, that the doctrine of *rebus sic stantibus* is not like the rule of the open sea, a doctrine which is understood and is not difficult to apply. It is a doctrine of great difficulty of application in our international society, and all that it amounts to, I think, is that it is one of those incomplete rights that Westlake speaks of, but that it does authorize a country that is signatory to a treaty, and which believes that a reason for its application to that treaty has risen, to request, nay, to demand, a conference with the other parties to the treaty to consider modification, but it does not authorize any one signatory, at its own will to pass upon the complicated questions of fact and of intention of the original parties to the agreement involved in the application of the doctrine of *rebus sic stantibus* in a particular case.

Mr. MACMURRAY (Presiding). I believe it is the custom of the Society, after the set speeches, to throw open the meeting for discussion under the five-minute rule.

Mr. YUEN-LI LIANG. I am not here as a defender of China, official or unofficial, but rather as one who is a former diplomat and generally interested in international law. As I was walking out of this building yesterday I met a distinguished professor of a prominent law school, and referring to the doc-

trine of *rebus sic stantibus*, he said there was no such animal. I replied, "But there is such a doctrine," and left him with a feeling of sadness.

In recent years it has been a fashion to demolish some of the fundamental conceptions of international law. Sovereignty, which is the only word which a weak nation can invoke to defend itself, has been dissected and has acquired an odious meaning in the vocabulary of international law. Territorial independence and political integrity have been given ironical interpretations as we have witnessed in recent months. While I was attending the Conference for the Codification of International Law at The Hague in 1930, a very distinguished member of the conference, a jurist of world reputation, who was my neighbor, said to me, "We are not codifying international laws, we are destroying international law."

I do not say that the doctrine *rebus sic stantibus* has attained the same degree of firmness in international law as the other fundamental conceptions, but I do think *rebus sic stantibus* serves two purposes, one of which is essential, and one of which is useful. It is essential in the sense that it is the machinery of progress. In municipal law, we have the judicial processes well-developed to adapt the law to changing conditions. In international law such institutions are not well developed. If we have a contractual relation which has become obsolete and time is not of its essence, then I believe the doctrine of *rebus sic stantibus* should apply—not depending on the interpretation of one party—to enable the modern international law to get abreast of the times.

The doctrine is useful in preventing international controversies by removing the very causes. I had the pleasure and privilege of participating in the League of Nations Assembly in 1929, and on that occasion the Chinese delegation put up a proposal before the League for the revitalizing of Article 19 of the League Covenant by creating a commission to examine into whether certain treaties have become obsolete. As usually happens in such cases, that proposal did not get through, because of political opposition on the part of some members of the League. Now we are witnessing in the Far East exactly the situation which the writing on the wall in 1929 indicated. The Chinese delegation indicated, among other things, that Manchuria was a sore spot and ought to be dealt with by international action on the principle of Art. 19 and that the treaty relations there should be rectified by a Commission under the auspices of the League. We have now the ocular proof of the necessity of the application of the *rebus sic stantibus* doctrine and I am certain that if some steps had been taken in 1929 a very turbulent and disagreeable situation would have been averted.

So much for the doctrine *rebus sic stantibus*. I do not have the temerity to challenge any of Mr. MacMurray's remarks, with which any reasonable man might differ.

MR. THEODORE MARBURG. As briefly as possible, a few points. First, as to the matter of duress. Most treaties made after a war have an element

of duress in them, and if the conqueror knew that duress would vitiate the treaty, he would be tempted to sit down permanently in the territory of the conquered. The institution of slavery is an analogy. It was an evil, but it was a step forward over the old practice of slaughtering all prisoners. Duress in treaty-making has, of course, produced injustices, and these injustices people have attempted to redress by renewed use of force later on.

A reading of the very interesting volumes of British diplomatic history shows one how the shores of history are strewn with the wrecks of treaties. Very often the ink has hardly been dry on them before they have been violated; and this leads to my second point, which has been so ably discussed by several of the speakers, namely, the need of machinery for doing away with outworn treaties. It is recognized, of course, that a central conference, such as the League of Nations, cannot order a change in any agreement between nations; but there should be a recognized right of nations to appeal to some central body for relief, and it should come to be the established practice. The nations, of course, could only express the hope that the conditions complained of will be corrected. They would have no right to order it done.

The third point I would like to make is that until we have some change in the Covenant of the League which will permit of joint intervention in backward countries, we are certain to have intervention by single nations. The great Powers are not going to stand for the murder of their citizens and the spoliation of their property in such countries, no matter what the League of Nations has to say about it. The United States has resorted frequently to intervention in the past and will undoubtedly do it again. You will remember Mr. Taft said, that, after an election in a Central American State, "The minority takes to the woods and shoots itself into a majority, the object being the honey-pot, the customs house." We were forced to go into Haiti. No president had stepped out of office peacefully for 75 years before we went there. The last man was taken from the French consulate and torn limb from limb in the streets of Haiti. The Powers are not going to put up with that sort of thing. There must be some legal provision for joint intervention in such countries.

Just one word more on the supposed similarity between the private moral code and the code of nations. I need mention only the American Indian. Without any legal right or any moral right under the individual code, we took away his country; and by the same token we ought to give it back to him. Such a conclusion shows that the private code cannot be applied to nations.

Professor QUINCY WRIGHT. There is just one point in connection with the use of duress that it seems to me might be emphasized. I think under the present treaty arrangements in the world this question is very closely related to the question of the validity of a treaty which has been made contrary to the rights of third parties. I believe it is a fairly accepted rule of international law that a treaty which violates the rights of third parties is not

valid without their consent. As an illustration I might refer to the clause in the Treaty of Portsmouth by which Russia ceded her lease of the Kwantung territory to Japan. It was recognized that under international law that transaction was not valid without the consent of China, and China subsequently was consulted and eventually recognized this transaction in the Treaty of Peking.

At the present time we have a treaty between sixty countries of the world, by which it is agreed that they will not settle disputes except by pacific means. Consequently, if duress is used in the future in the making of a treaty, that is, if non-pacific means are employed in the making of a treaty, the rights of all the other parties to the Kellogg Pact will have been violated. Consequently, in principle, the treaty will not be valid until it has been recognized by all the other parties to the pact. That, I understand, is the principle upon which Secretary Stimson has based his notes. He is not saying necessarily that as between China and Japan a possible treaty made under duress would not be valid, but he is saying such a treaty would be contrary to the rights of all the other parties to the Kellogg Pact, and, therefore, so far as they are concerned, it cannot be considered valid until they have recognized it, and he has informed the world the United States does not intend to recognize it. Therefore, I think that the existence of the Kellogg Pact legally places the problem of duress on an entirely different basis. It means such a treaty cannot be valid until it has been recognized by all the parties to this pact.

Professor JAMES W. GARNER. I believe that this horrible Latin phrase, *rebus sic stantibus*, embodies a very vital and important principle, and one about which we are going to hear a great deal more in the future than we have been hearing in the past, although, as a matter of fact, the doctrine has been invoked in three cases before the Permanent Court of International Justice. It has been invoked a dozen times in the last ten or fifteen years by countries as a justification for a demand for a revision of treaties. It has a very good analogy in the doctrine of the frustration of contracts in municipal law. I think I can see signs of an increasing disposition to reject the doctrine of the perpetual binding force of treaties of a purely contractual character, such as those of an economic character, and those which impose servitudes upon states. I think there is an increasing disposition to insert in such treaties revisionary clauses, and I was very glad to see in the Nationality Convention of 1930 such clauses.

I recall a clause of that kind in the treaty between Switzerland and Germany and Italy, regarding the St. Gothard Tunnel. I think Professor Chamberlain has correctly interpreted the doctrine of *rebus sic stantibus*. I do not believe that it gives one party the absolute right to terminate unilaterally a treaty, however much the burdens may have shifted to one side and the benefits to another, but it does give a dissatisfied party a very strong moral claim to insist upon a revision or to insist on the adaptability of that

treaty to the changed conditions, and it imposes on the other party an equally strong moral obligation to consider seriously that demand. I think if in 1909 Germany had refused to consider Switzerland's demand for revision of the St. Gothard Treaty, Switzerland would have been justified in taking exceptional measures to free herself from its burdens.

When a committee of the Senate of the United States once reported that in its judgment the United States had the right to terminate unilaterally the Clayton-Bulwer Treaty because of changed conditions, I think the attitude of the Senate was wholly wrong, and neither government in fact acted in accordance with such a view. As everyone knows, Blaine and Olney approached Great Britain, pointed out that the conditions had changed and requested an abrogation of the treaty. That was done, and the old treaty was replaced by a new one.

Now, Mr. Chairman, that in my opinion is all that the doctrine of *rebus sic stantibus* means, and I think it is a vitally important doctrine of greatly increasing importance in this age of rapidly changing conditions.

Mr. DENYS P. MYERS. These doctrines of *rebus sic stantibus* and duress have been discussed almost without a relation to the content of treaties. I think anyone who studies treaties, particularly since the war, will have been impressed by the standardization of the formal clauses, particularly the almost universal habit now of making treaties for a given period, and of having very precise provisions for denunciation. Now, those provisions in a treaty are in reality a tacit recognition of the doctrine of *rebus sic stantibus*, and they provide a normal and proper means of raising the question as to whether conditions have changed.

So far as I know that system is operating smoothly enough now, but only recently it was not. I have in mind an American commercial treaty which contained the denunciation clause, and which was denounced by the other state to take effect within a year. The United States did not much like the idea of that treaty being denounced at that time, denunciation raising some questions, I believe, that had a Congressional angle; so our government very carefully avoided acknowledging the denunciation of the other country. That led to an indeterminate condition. A little while later that treaty began to tread on our toes and so, disregarding the other country's denunciation of several years before, we denounced the treaty, and the other country, looking up the records, or having a good memory, said, "Well, we will not acknowledge this denunciation." About ten years ago that treaty was again denounced by the other country. It happened that I was working at the time on a collection of treaties and, as I was trying to deal with the thing in a precise way, I inquired of the Department of State about the status of the treaty, because I had found that this was the third time it had been denounced under a specific and distinct clause. The department informed me that they did not pass upon such matters without a definite case before them; that this was a theoretical question.



That attitude seems to me to have created a great deal of difficulty in the past with respect to *rebus sic stantibus*. In that particular case, I had an opportunity to discuss the matter with the writer of the Department's letter. I asked him why it was we did not recognize the right of denunciation and let the thing go at that. "Well," he said, "perhaps sometime we might want to adduce the treaty provisions, and if we acknowledged the denunciation, then we wouldn't be in a good position to claim under it." That attitude, which in the very recent past, I believe, has been exceedingly prevalent, seems to me, as facts have come to my attention, to be rapidly disappearing, and it seems further to me that with this sanitation, let us say, of practices respecting the formal clauses of treaties, this doctrine, which seems both clear and justifiable, is likely in the future to encounter much less difficulty of application than it has in the past.

PROFESSOR CHARLES G. FENWICK. We seem to be confusing the theoretical and the practical aspects of this situation. There are two distinct classes of treaties: legal treaties, which give rise to the obligation of good faith and are binding for that reason. Such are treaties concluded freely between the contracting parties, based upon a consideration deemed adequate, and entered into upon a basis of equality. On the other hand, there are what may be called political treaties, based upon force, entered into under duress, and accepted by the coerced party as an alternative to worse evils. Such are treaties of peace and treaties entered into under direct or indirect threat of war. These treaties give rise to no obligation of good faith, as is attested by the fact that the coerced state has been regarded as free to declare war and put an end to the treaty. As to the rule of *rebus sic stantibus*, it clearly applies to legal treaties only under the most exceptional circumstances which can not be formulated into a general principle; and, on the other hand, the rule does apply to political treaties.

When one goes back and reads the older authors, there is something naïve in their attempt to rationalize the use of force. In this year 1932 let us be spared having Phillimore quoted at us, or Bluntschli, or that still more unsophisticated Vattel, that treaties of peace obviously made under duress are binding because the defeated party had the option of having the war continue longer, and maybe being wiped out altogether, or signing the treaty of peace. As it preferred not to have the war continue longer and be wiped out, it was supposed to have voluntarily signed the treaty of peace, which perhaps imposed intolerable conditions upon it. As it voluntarily signed the treaty, the agreement was binding because of the voluntary act. Suppose that a highway robber demands my watch at the price of my life. If I give him my watch, I have voluntarily done so, because I prefer my life to the watch. It is ridiculous!

What standing in international law have the treaties that I have described as "political"? Some standing at least, namely, one that represents the recognition that for the sake of international stability and pending the



establishment of more effective agencies of justice, it may be better for a state to acquiesce in treaties imposed upon it by force rather than start another war to undo them. In this case the factor which gives validity to the treaty is not the paradoxical consent of the coerced party but, as Professor Chamberlain has expressed it, the general benefit to the whole community that the problem be not reopened at this time. Obviously, if we are to make any progress in international law, every treaty imposed by duress must be ultimately reopened, or the conditions attending it be reëxamined, except where title by prescription may have intervened and long user made the situation irremediable. Even the argument of stability in international relations must yield sooner or later to the demands of justice.

Mr. LIANG. I think there is one point nobody has mentioned, nor was it taken up by Mr. MacMurray in his statement of facts. It is this: the Twenty-One Demands were forced upon China in circumstances which cannot be likened to the circumstances which form the basis of a war settlement. They were forced upon China in time of perfect peace, when there were no issues pending between the two countries. I must emphasize this point; that it is not a war settlement. I am very sorry that this point was not made by Mr. MacMurray. While I do not want to challenge his other statements, which are, of course, highly controversial, I do want to bring this point out, in view of what Professor Fenwick has said in regard to the validity of treaties consequent upon a war.

Mr. MACMURRAY (Presiding). If there is no further discussion, we will adjourn until 2 o'clock this afternoon.

(Whereupon, at 12:30 o'clock p. m., the Society adjourned until 2 o'clock p. m.)

### THIRD SESSION

Friday, April 29, 1932, 2 o'clock, p. m.

#### ROUND TABLE CONFERENCE ON THE TREATY SITUATION IN THE FAR EAST (Continued)

Presiding: STANLEY K. HORNBECK, Chief of the Division of Far Eastern Affairs, Department of State.

MR. HORNBECK. The meeting will come to order. My sole function is to preside over this session, but I think it eminently appropriate, on this day when we are discussing treaties in relation to the Far East, to make mention of and pay tribute to one who has contributed much to the making and interpretation of international law in connection with Far Eastern matters during the past four decades. I refer to Mr. Ransford S. Miller, Foreign Service Officer of Class One, whose career came to an abrupt close last Tuesday.

Mr. Miller entered the service of his government 37 years ago. From then until the hour of his death he devoted his life to questions and problems of the relations of his country to countries of the Far East. He spent some 15 years in the aggregate on duty in the American Embassy in Tokyo and an almost equal period in Korea. The rest of his service was in the Department of State, where he was during four periods on duty and was during two periods Chief of the Division of Far Eastern Affairs. He rendered eminent service both in the field and at headquarters. He made friends everywhere. He contributed constantly to the maintenance of amicable relations and the solution of difficult problems. The knowledge, the maturity of judgment, the tactfulness and patience, the thought and the effort which he brought to bear on the problems with which his government has been long concerned in relation to the situation in the Far East during the last year of his service have been of incalculable value.

In his passing those of us who were most closely associated with him have lost a beloved friend and an esteemed colleague. In law and in diplomacy we have lost an indefatigable, conscientious and effective craftsman. In the Foreign Service of the United States we have lost a distinguished officer who, because of his unusual qualities in combination, can never be exactly replaced.

Mr. Woolsey was very insistent that although I had agreed merely to be the presiding officer of some session of this meeting of the Society, I should say a few words in connection with our recent and current efforts in connection with the situation and the problems which have developed in the Far East during the past few months. It is a difficult thing for me to attempt to do anything in that connection. I would find it quite impossible from several points of view to attempt to discuss the course of events or to give a

historical narrative of our efforts. It is altogether too large a subject and one in relation to which I must confess I feel that I have very little perspective, looking from the inside out, or from down among the trees. I do not feel that I know what the forest looks like, but I will give you just a brief sketch of what seem to me to have been the guiding principles of the course of action which we have followed. I shall be very brief. This is nothing but a sketch, nothing but the barest outline, an outline on the basis of which a small encyclopedia might be written.

SOME PRINCIPLES AND CONSIDERATIONS UNDERLYING AMERICAN POLICY IN  
RELATION TO THE CURRENT SITUATION IN THE FAR EAST

The policy of the United States with regard to this whole situation is nothing more nor less than a particular application of the general principles of American foreign policy.

These general principles include: (a) in general, respect for the legal and moral rights of other states and peoples—with expectation of respect by them for the legal and moral rights of the United States; (b) in regard to commerce, equality of opportunity and treatment—on the basis of most-favored-nation practice; (c) in regard to political methods, abstention from alliances and from aggression; (d) in the field of diplomatic approach, persuasion rather than coercion; (e) in regard to action, coöperation with other Powers wherever coöperation is found practicably possible.

In formulating its attitude and course of action with regard to the current Manchuria and Shanghai situations, the American Government has kept before it certain broad considerations of law, of policy and of interest which may be outlined as follows:

The United States has no legal standing in the organization of the League of Nations, and although the American Government can coöperate with the League—as it has been doing for a number of years past—it cannot involve this country in the legal machinery of the League as such.

The United States holds no special mandate to apply, interpret or enforce the obligations of the Kellogg-Briand Pact. The pact itself does not prescribe or authorize any procedure for its own observance or enforcement. It is an instrument of renunciation, not a constitution of mechanism for enforcing peace. It must rely, for efficacy, upon the sanction of public opinion.

The general policy of the United States with regard to China is expressed in the provisions of the Nine-Power Treaty. The American Government emphasizes that treaty, not only because of the desirability that agreements should be respected, but because the provisions of that treaty envisage and express the practical interest, not alone of China, but also of Japan, of the United States and of the other nations which are signatories. That treaty expresses the historical policy toward China of the United States and the principles agreed upon since the beginning of this century by the other

Powers that have rights and interests in the Far East. It contributes toward maintenance of an equilibrium in the Far East, safeguarding the ultimate interests of all the signatory Powers.

It has seemed proper and desirable to maintain an attitude of impartiality as between the disputant countries.

It has seemed advisable to act in coöperation or concert with other Powers concerned. The United States and Japan are both Powers on the Pacific Ocean. The Washington Conference Powers all have interests in China. These facts suggest a line of action based firmly on the principle of respect for and solicitude in regard to the fundamental rights and interests of all of the Powers concerned in relation to the political and economic development of the Far East.

The problem of maintaining peace is a common or world problem; it is the proper concern of the whole community of nations, not a right or an obligation peculiar to any one nation.

With these broad principles in mind, the American Government has followed and is continuing to follow in reference to the problems which have arisen out of these situations a policy of coöperating with every nation and every international agency which chooses to act in support of peace and of the agreements and machinery which have been created for its maintenance.

That, I think, explains fundamentally the underlying principles of our effort, or the effort which we have attempted to make during this period of crisis and problem.

Mr. HORNBECK (Presiding). We all very greatly regret that Professor E. T. Williams, who was to have read the introductory paper this afternoon, has not been able to come on to Washington. Professor Williams was another of the veterans of the foreign service in connection with our relations with the Far East. He is well known to most of the members of this Society. I personally had looked forward with the most pleasant anticipation to seeing him here, but I regret to say he is not here. Professor Colegrove has very kindly been persuaded to present a synopsis of Professor Williams' paper. I think it is exceedingly kind of Professor Colegrove to read this synopsis, inasmuch as he has a paper of his own to bring out a little later in the afternoon.

(The full text of Professor Williams' paper follows):

## TREATY OBLIGATIONS AND TREATY OBSERVANCE IN MANCHURIA

BY E. T. WILLIAMS

*Agassiz Professor (emeritus) of Oriental Languages and Literature,  
University of California*

The first attempt to encroach upon the territorial integrity of Manchuria was made by the Russians, who entered the beautiful valley of the Amur in

1644, the same year in which the Manchus captured Peking and set up there the Ta Ch'ing Dynasty. The Russian explorers found towns already existing upon the banks of the river. The inhabitants were living in stone houses and possessed other evidences of civilization. Notwithstanding this, the Russians proceeded to make settlements there, from which they were subsequently expelled by the Chinese, who compelled them to make the Gorbitza River and the mountains north of the valley the boundary between Manchuria and Siberia. This was done in the Treaty of Nerchinsk signed in 1689. It was probably the longest-lived treaty on record, since it remained in force until 1858.

The Crimean War broke out in 1854 and Russia found it convenient to use the Amur River to transport munitions and other supplies to Petropavlosk in Kamchatka. Muravieff did not ask permission of China, since that course would have delayed relief. His forethought saved Kamchatka to Russia and defeated the British and French fleets that attacked Petropavlosk. China promptly protested against Russia's use of the Amur River, but Muravieff was tactful; he pleaded necessity and suggested a change of the boundary as desirable. China could not back up her protest with force, since she was engaged in a bitter struggle with the Taipings and was also drifting rapidly into war with Great Britain and France. The two Powers just mentioned were thus the common foes of China and Russia, a fact which Muravieff called to the attention of the protesting mandarins. In reply to the Chinese reminder that the treaty made the Gorbitza River the boundary, he recalled to their memories their own frequent violations of that treaty by their collection of tribute from tribes north of the boundary who were subjects of Russia. After four years of good-natured remonstrance and rejoinder, Muravieff persuaded the Chinese to make the Amur as far as its junction with the Ussuri the boundary, and to permit the Russians to navigate both the Amur and the Sungari.

In 1860, after the British and French forces took Peking, Russia proffered her good offices and subsequently made this the basis of a claim to generous treatment by China. The Chinese responded by giving Russia the region east of the Ussuri. Thus the port of Vladivostok became a possession of the Tzar, and that without any display of force.

The relations between Russia and China thereafter remained undisturbed until after the close of the China-Japan War of 1894-1895. But Russia had not lost her interest in Manchuria, whose fertile valleys and treasure-laden mountains sorely tempted her. So, when Japan demanded of China as a condition of peace the cession of southern Manchuria, Russia persuaded France and Germany to join in a protest against the transfer of any mainland territory to Japan. Southern Manchuria was accordingly retroceded to China upon agreement to pay additional indemnity. For these good offices of three great European Powers China naturally had to pay dearly.

The following year, 1896, the Tzar was to be crowned at Moscow. The Viceroy, Li Hung-chang, was sent to represent China. He carried his coffin with him, for it could not be duplicated outside China and the Viceroy might need it. He must have been considerably chagrined when a fire in the hold of his vessel partially destroyed that precious article. He was spared, however, to sign a treaty of alliance with Russia while at Moscow. This treaty pledged the two signatories, each to support the other in case Japan should attack Russia or China, and bound them not to make peace with the enemy unless both should consent. China was to open her ports to Russian vessels during the continuance of military operations. The treaty was to last for fifteen years.<sup>1</sup> When the opportunity for its application arose, however, in the war between Russia and Japan, the Chinese, as we shall see, were unwilling to live up to it.

The treaty provided also for the building of the Chinese Eastern Railway across northern Manchuria for some 900 miles, which would save about 300 miles of the distance from Moscow to Vladivostok. In the contract between China and the Russo-Chinese Bank for the construction of the line, the Chinese Eastern Railway Company is given absolute and exclusive right to the administration of its lands. The meaning of this clause has been much disputed. The Russians, acting upon their interpretation of it, proceeded to convert the railway lands at Harbin into a Russian municipality under Russian law. China protested that this was a violation of her sovereignty, an encroachment upon her territorial integrity and administrative entity. The American Government also protested, since the assumption of such a right by the railway company placed American citizens under Russian law in contravention of our treaties with China. The American Government held, furthermore, that such an exercise of political rights by a private corporation was anomalous.

The designation by certain European Powers and by Japan of spheres of interest in China caused Secretary Hay in 1899 to propose his doctrine of the "Open Door," which provided for equality of commercial opportunity within such so-called "spheres of interest." All the great Powers of the world assented to the policy, but China was not consulted. This "slicing-the-melon" policy, as the Chinese called it, aroused great excitement in China and led to the organization of the "Boxers." It was my duty to translate some of the earliest circulars put out by this society. They were directed against the Manchu Government rather than against the foreign Powers, since the weak court at Peking had assented to the leases of territory and had given the promises asked as to non-alienation of certain provinces. A young mandarin said to me one day: "If you foreigners would keep your hands off, we should soon make an end of the Manchu rule."

<sup>1</sup> Although there were rumors of the existence of such a treaty, no official publication of its text was made until it was communicated by the Chinese delegation to the Washington Conference in 1922.



The end came indeed, but not as he expected. The direction of the Boxer movement was soon changed and made anti-foreign in its aims. The arrival of foreign armies and the capture of the Taku forts led to a declaration of war by China. This was followed by an edict ordering destruction of foreigners wherever found. In obedience to this edict, Chinese soldiers at Aigun on the Amur River, on July 14, 1900, fired upon a Russian steamer, killing an officer and wounding a number of men. The next day they fired across the river into the city of Blagovestchensk, killing and wounding several more. In reprisal the Russians sent an armed force across into Aigun and massacred men, women, and children without mercy. They then with solemn religious ceremonies took possession of Manchuria in the name of God and the Tzar. The Russian Government disowned the barbarity exhibited in the massacre, but did not disown the words of the priest who said: "Yesterday this was the soil of China; today it is ours. This fulfills the prophecy of Muravieff." Following upon this act of appropriation, the Russian armies swept across Manchuria and occupied every important city in it.

A few days before the Aigun massacre, Secretary Hay addressed the Powers in another note, applying the doctrine of the open door to all China, and not merely, as the first note did, to the leased territories and spheres of interest. In reply on August 28, 1900, the Russian *Chargé d'Affaires* made a statement to the Secretary of State, in which he said: "As already declared Russia has no designs of territorial acquisition in China."<sup>2</sup> In a subsequent communication in 1902, when China was urging Russia to withdraw her troops from Manchuria, and Russia was said to be urging upon China a separate and secret arrangement for the acquisition of special and exclusive privileges in Manchuria, the American Government enquired as to the truth of the report, and was informed by the Russian Government: "There is no thought of attacking the principle of the 'open door' as that principle is understood by the Imperial Government of Russia."<sup>3</sup> This would seem to indicate that Russia understood the pledge in some Pickwickian sense.

As the allied armies fought their way towards Peking, the frightened court pleaded with Li Hung-chang to stay their advance. He came from Canton to Shanghai, where it became my duty to serve as interpreter at an interview with him. He urged earnestly that the foreign troops ought not to go to Peking, that it was unnecessary, since the legations could be brought to Tientsin and peace negotiations be conducted there. He said: "Peking is poverty-stricken; the soldiers will find no loot there." To one who looks back now and remembers the looting, official and unofficial, that took place a few weeks later of gold, silver, jewels, and art objects of rarity and great value, the statement of the Viceroy seems a trifle disingenuous. But he was carrying out his orders to the best of his ability.

The foreign Powers interested, except Russia, were not inclined at first

<sup>2</sup> Foreign Relations of the U. S. 1901, Appendix, p. 19.

<sup>3</sup> *Ibid.*, 1902, p. 929.

to accept Li as the representative with whom they should negotiate peace; but they did accept him later. The Russian Government, being the secret ally of China, supported Li's proposal that the legations should withdraw from Peking, and accordingly in September, 1900, the Russian Legation and the Russian troops withdrew to Tientsin.<sup>4</sup> No other government was willing to follow this example, and in October the Russians returned to the capital.

Sir Robert Hart expressed the opinion that Russia was planning to obtain some advantage in Manchuria in return for this support of Li Hung-chang.<sup>5</sup> In this opinion he was undoubtedly right, for it soon became rumored in legation circles that Russia was negotiating with Li a secret arrangement of this sort. The matter was brought to the attention of the American Government in January, 1901, and repeatedly thereafter during that year. But Li died on November 7, 1901, leaving the agreement unsigned.<sup>6</sup> Russia, however, continued to urge China to sign. On February 1, 1902, Secretary Hay circulated a memorandum among the interested Powers, in which he said: "An agreement by which China cedes to any corporation or company the exclusive right and privilege of opening mines, establishing railways, or in any other way industrially developing Manchuria, can be but viewed with the gravest concern by the Government of the United States."<sup>7</sup> On the 8th of February the Russian Ambassador called upon Secretary Hay and said he feared the action of the American Government might encourage the Chinese to refuse to sign the agreement that Russia had negotiated with them. To this the Secretary replied that the grant of the exclusive privileges asked for the Russo-Chinese Bank would, if made, induce other Powers to ask exclusive privileges in other parts of China.

Prince Ch'ing, however, had no desire to see the ancestral home of his race pass under the control of Russia. He had already been urging the Rus-

<sup>4</sup> The U. S. Foreign Relations, 1901, Appendix, p. 19.

<sup>5</sup> Morse, *International Relations of the Chinese Empire*, III, p. 306, n.

<sup>6</sup> It may possibly be of some interest to mention a personal experience. On the day which was to bring Li's life to an end the American Minister sent me to the Viceroy's home to consult with him about a matter pending between the United States and China. In the reception room a secretary told me that Li was very ill and could not see me. Some days later the Military Governor of Peking told me that the aged Viceroy's death had been caused by a paroxysm of rage induced by his discovery that a subordinate had been bribed to alter a memorial to the Throne in which the name of a man, whom Li had recommended for Manager of the Peking-Mukden Railway, had been replaced by that of the briber. The Imperial Edict had been issued appointing the briber to the post and, since Li could not confess that he had not read over the text of the memorial, he was helpless. He had been a paralytic for some years; this attack of anger brought on another stroke that ended his life. It would be interesting, although futile, to speculate upon the probable course of events if the Viceroy had lived to sign the agreement. It is not likely that Japan could have been kept from war, and, even had China's ports been thrown open to Russia, the outcome of the conflict would probably have been just what occurred.

<sup>7</sup> U. S. For. Rel. 1902, p. 929.

sians to withdraw their troops from Manchuria, and the Russians had been insisting upon some *quid pro quo*. The United States, Great Britain and Japan were all unitedly engaged in the attempt to block Russian plans in Manchuria. This fact, with the news of the alliance between Great Britain and Japan, which appeared to be especially directed against Russia, at last induced Russia on April 8, 1902, to sign an agreement with China according to which Russian troops in Manchuria would be withdrawn within eighteen months, divided into three periods of six months each. During the first six months all Russian forces were to be withdrawn from the southwestern part of "the Province of Mukden" (now Liaoning) "up to the River Liao."<sup>8</sup> This stipulation was observed, but when the time arrived for removing the troops from the remainder of that province and from the Province of Kirin, the Russian Government made new conditions. Among these was a stipulation that no new treaty ports or foreign consuls were to be allowed in Manchuria. The United States and Japan were severally negotiating new commercial treaties with China and both were asking for the opening of additional ports in Manchuria and the privilege of stationing consuls at such cities. China declined to accede to the Russian demand, and Russia refused to keep her agreement as to withdrawal. I travelled through a good part of Manchuria in 1902, and everywhere found the Russians in control and diligently engaged in strengthening their position by hastening the completion of their railways. The Nonni River was being bridged and the Hsingan Mountains being tunnelled. Admiral Alexeieff was governing the whole region under the title of "Viceroy of the Far East." Under pressure of Russian demands, China for some months declined to open new ports, but finally gave way to the requests of the United States and Japan. I accompanied the American Minister to Shanghai as his secretary, and there on October 8, 1903, the new commercial treaty was signed by which Mukden (now Shenyang) and Antung were opened to foreign residence and trade. The Japanese negotiations were still in progress, but they decided to sign on the same day. There was a rather tense feeling among the commissioners, some of whom realized that the rivalry between Japan and Russia was likely to lead to war between those two nations. Three months later the war had broken out. Japan received the moral support of the United States and Great Britain. This offended our friends in the Russian Legation, some of whom refused all social intercourse with us.

Russia had violated her pledges as to the open door and the territorial integrity of China, and was manifestly in the wrong, but, in forcing Russia out of Manchuria, we were but preparing to substitute Japan, whose government was about to adopt a course very similar to that which we condemned in Russia. Indeed, our trade in Manchuria was to suffer more damage under Japanese control than it could have suffered under that of Russia, for in certain manufactures Japan was our chief competitor.

<sup>8</sup> MacMurray's *Treaties and Agreements with and Concerning China*, Vol. I, p. 327.

The war was fought on Chinese territory. The treaty of alliance between Russia and China was still in force. China declined to observe it and declared her neutrality, except that the provinces of Manchuria were made a war zone, within which military operations of the belligerents were to be confined. The declaration of neutrality somewhat alarmed Russia, for, while Chinese military assistance would have been of little avail, China could have furnished certain supplies for the Russian Army, and the Chinese ports, which under the terms of the treaty were to be open to the occupation of Russia, were closed against her, thus depriving her naval vessels of coaling stations and of docks for repairs. After the battle of Mukden, the Russians fell back to the vicinity of Ch'angch'un, and President Roosevelt used his good offices to bring about an armistice and the negotiation of a treaty of peace. This was signed at Portsmouth, N. H., on September 5, 1905. That treaty imposes certain important obligations. It pledged the two high contracting parties "to restore entirely and completely to the exclusive administration of China all portions of Manchuria" then in the occupation or under the control of Japanese or Russian troops, with the exception of "the territory affected by the lease of the Liaotung Peninsula."

This obligation does not appear ever to have been fulfilled by Japan. For a year after the signing of the peace treaty with Russia, Japan remained in control of South Manchuria and retained there the police administration that she had established in various cities that had been occupied by her forces. After the conclusion of peace she set up police boxes along the South Manchuria Railway, although there was no treaty warrant for such a proceeding. Railway guards were allowed by the Chinese Eastern Railway Company's regulations, but these are entirely separate from the police. The guards were intended for the protection of the railway; the police, intended for the protection of Japanese subjects, have been maintained over the protests of China and have frequently interfered with local Chinese administration. These Japanese police offices have been established, not only in open cities, but in other places, and, as was to have been expected, the Japanese police have not infrequently clashed with those of China. One of the most recent instances occurred at Wanpaoshan in the spring of 1931. A number of Koreans, settled in Manchuria, had leased some 700 acres of land, and, in order to provide water for irrigation, had constructed a dam in the Itung River, about seven miles distant. This dam threatened to cause an overflow to the damage of adjoining Chinese farm lands. The Koreans then dug a canal from the river to their own land, crossing intervening Chinese farms without the permission of the owners. The leasing of the land had not been approved, as required, by the magistrate; neither had the construction of the dam and canal been allowed. At once a row was created between Koreans and Chinese, in which the Japanese police, who had no right to be there, supported the Koreans and the local Chinese police defended the Chinese.

It is evident that Japan, in establishing her police in the railway zone in Manchuria had done no more than Russia had done, since Russia had established a municipality at Harbin on the railway lands. But this precedent did not justify the stationing of her police in places outside the limits of the leased territory and those of the railway zone. This matter was called to the attention of the Washington Conference by the Chinese delegation at the ninth meeting of the Committee on Pacific and Far Eastern Questions on November 29, 1921. From this report it appeared that there were 811 Japanese policemen in the leased territory and 1,052 in other districts of Manchuria. Some of the latter number are attached to Japanese consulates, but most of them are functioning along the railway lines. In reply to the Chinese complaint of this illegal proceeding, the Japanese said that the employment of armed forces, including police, in various parts of China was due to the lawlessness prevailing in those regions and China's inability to give the needed protection. As to the police attached to Japanese consulates, it was held by Japan that they were necessary to the proper exercise of extraterritorial jurisdiction over their subjects in China and that they did not interfere with others. The Chinese rejoined that other Powers enjoying extraterritorial jurisdiction did not find it necessary to employ police, and China questioned the statement that Japanese police did not interfere with Chinese.<sup>9</sup>

According to the published reports of the affair at Wanpaoshan,<sup>10</sup> the Japanese police were charged with firing upon Chinese peasants and with supporting the Koreans in refusal to obey Chinese police regulations. Yet it is the Japanese, not the Chinese, who insist upon the validity of the 1915 treaties, one of which stipulates that Japanese subjects who lease land for agricultural purposes "shall submit to the police laws, and ordinances and taxation of China."<sup>11</sup>

The employment of police in the service of the consular courts would not be subject to severe criticism if they were to confine their work to the requirements of the courts. All extraterritorial courts need officers to serve warrants and subpoenas, to arrest persons charged with crime and to execute other orders of the courts, but it is not customary to employ police in these duties. The American courts have marshals for these purposes, but they are not given patrol duties, nor are they employed to preserve peace and good order, which is the responsibility of the territorial authorities.

The use of railway guards along the Japanese lines in Manchuria is not open to the same objections as is the stationing of police boxes in the railway zone. Under the original contract between China and the Russo-Chinese

<sup>9</sup> See official Report of the Conference, 8th, 9th, 11th and 13th Meetings of the Committee on Pacific and Far Eastern Questions.

<sup>10</sup> Wanpaoshan Incident, edited by Whitewall Wang, published by the International Relations Committee of the Chinese National Government.

<sup>11</sup> MacMurray's Treaties, Vol. II, p. 1220.



Bank, the Chinese Government was to "take measures to assure the safety of the railway and of the persons in its service against *any* attack."<sup>12</sup> But the statutes of the Chinese Eastern Railway, issued at St. Petersburg in December, 1896, provide that the Chinese Government was "to adopt measures for securing the safety of the railway and of all employed on it against any *extraneous* attack. The preservation of law and order on the lands assigned to the railway and its appurtenances" was to be "confided to police agents appointed by the company."<sup>13</sup> (*Italics mine.*) The Chinese Government does not appear to have given its formal approval to this modification of the contract, but, on the other hand, they do not seem to have made any protest against the statutes, which were, in fact, put into effect. Russia and Japan, at the time of the transfer of the South Manchuria line, agreed to fix the number of guards at fifteen per kilometer.

In the treaty of December 22, 1905, between China and Japan, China assented to the transfer by Russia to Japan of that portion of the railway extending from Port Arthur to Changchun. Japan was to conform to the original requirements of the contract between China and Russia, and in a supplementary agreement it was stipulated as follows:

The Imperial Japanese Government, in the event of Russia agreeing to the withdrawal of her railway guards, or, in case other proper measures are agreed to between China and Russia, consent to take similar steps accordingly.<sup>14</sup>

Russia withdrew her railway guards years ago; the Japanese guards remain. When China requested Japan to fulfill her agreement, Japan replied that Russia's guards were not withdrawn voluntarily, but in consequence of the revolution in Russia and the later inter-allied administration of the Chinese Eastern Railway. That reply loses its force, however, when we recall that the present government of Russia entered into a treaty with China in 1924, the first article of which contains the following:

The Governments of the two Contracting Parties mutually declare that, with the exception of matters pertaining to the business operations, which are under the direct control of the said railway, all other matters affecting the rights of the National and the Local Governments of the Republic of China—such as judicial matters, matters relating to civil administration, military administration, police, municipal government, taxation, and landed property (with the exception of lands required by the said Railway itself)—should be administered by the Chinese Authorities.<sup>15</sup>

This would seem to show that as long ago as 1924 the Russians formally returned to China the civil, military, police and municipal administration formerly enjoyed by Russia in the zone of the Chinese Eastern Railway.

<sup>12</sup> MacMurray's Treaties, Vol. I, p. 76.

<sup>13</sup> *Ibid.*, Vol. I, p. 86.

<sup>14</sup> *Ibid.*, p. 551.

<sup>15</sup> The Sino-Russian Crisis, by International Relations Committee of the Chinese National Government.



Japan would appear to be bound by her agreement with China to make a similar rendition of military, police and municipal privileges exercised along the South Manchuria Railway.

Other examples may be given of Japan's failure to observe the requirements of the Portsmouth Treaty to "restore entirely and completely to the exclusive administration of China" those portions of Manchuria formerly occupied by Japanese troops. One of these examples is the retention of Japanese post offices there. On February 1, 1922, the Washington Conference adopted a resolution agreeing to abandon such postal agencies in China from January 1, 1923.<sup>16</sup> Yet as late as August 30, 1930, China was protesting against the operation of Japanese post offices in Manchuria, and in the summer of 1931 they were still in operation.

In the treaty of July 30, 1907, Russia and Japan together declared that they "recognized the territorial integrity of the Empire of China and the principle of equal opportunity in whatever concerns the commerce and industry of all nations in that empire and engage to sustain and defend the maintenance of the *status quo* and respect for this principle by all the pacific means within their reach."<sup>17</sup>

In not less than seven formal agreements Japan has pledged support to the policy of the open door and equality of opportunity for trade in China, yet in various ways she has sought to evade her obligations under these agreements.

During the two years (1905-1907) of the continued military occupation of South Manchuria by Japan, and while the Chinese customs service was unable to function there, the trade of Japan very naturally enjoyed considerable advantage over that of other nations. Transports carrying troops to Japan were able to give favorable rates to Japanese shippers of goods to Manchuria. All this was to have been expected. Moreover, one can not well complain of Japanese Government assistance to trade by loans to mercantile companies at low rates of interest, since other governments were at liberty to give similar aid to their own citizens. But, after the military occupation, there was no justification for the use of the South Manchuria Railway to give special rates to Japanese shippers. In 1914 this railway, which is to all intents and purposes a government concern, offered special rates to merchandise shipped direct from Japan through Dairen or Port Arthur to points north of Mukden. This was a plain discrimination against American and European goods. The American and British Governments made complaint that their merchandise was not shipped through Japan. The regulation was then amended to read "all merchandise shipped from a foreign port through Dairen or Port Arthur direct to points north of Mukden." The protesting governments insisted that this too was a violation of the open door agreements, since their goods were not shipped direct to points north of Mukden, but had to be transshipped at Shanghai, which is not a

<sup>16</sup> Official Report of the Conference, p. 182. <sup>17</sup> MacMurray's Treaties, Vol. I, p. 658.

foreign port as related to Mukden. Then the rule was again amended so as to give the special rates to all merchandise sent direct from Shanghai through Port Arthur or Dairen to points north of Mukden if carried in Japanese vessels. But this was a manifest violation of the principle of equality of opportunity in so far as Chinese, American and British shipping interests were concerned. Newchwang traders also complained of discrimination against that port.<sup>18</sup>

Russia was also guilty of discriminating against American trade in rates for shipments over the Chinese Eastern Railway. In 1908, the charge for American flour from Vladivostok to Harbin was 40 kopecks a pood, while for Russian flour travelling from Harbin to Vladivostok the rate was but 17 kopecks. A similar discrimination was made in favor of Russian kerosene as compared with the rate charged to American kerosene sent in the opposite direction.

The Portsmouth Treaty pledged both Russia and Japan to exploit their respective railways in Manchuria exclusively for industrial and commercial purposes, and in no wise for strategic purposes.<sup>19</sup> This pledge, as well as that relating to the open door policy, seems to have been cynically violated in the three secret treaties between Russia and Japan of 1907, 1910 and 1912. Information concerning these treaties came to me in 1921 from a source which I regard as perfectly reliable. Instead of the innocuous agreement of 1907 as given to the world, we have the following:

ARTICLE I. Recognizing the "natural gravitation of interests and political and economic activity in Manchuria," Russia and Japan mutually agree to delimit their efforts to obtain concessions in the matter of railways and telegraphs in accordance with the line fixed in the Additional Article. A reservation is made as to that part of the Chinese Eastern Railway which extends south of the line of delimitation.

ARTICLE II. Russia recognizes Japan's "relations of solidarity" with Korea and engages to respect their future development. Japan assures to Russia most favored nation treatment in Korea.

ARTICLE III. Japan recognizes special interests of Russia in Outer Mongolia and engages to abstain from anything prejudicial thereto.

ADDITIONAL ARTICLE. (Line of Delimitation.) Beginning at the northwest point of the Russian-Korean frontier, and forming a succession of straight lines, the line runs, passing by Hunchun and the point of the northern extremity of the lake of Porteng to Hsiuchinchuan; from there it follows the Sungari to the mouth of the Nunkiang, to mount thereafter the course of this river as far as the mouth of the river Tolaho. From this point the line follows the course of this river as far as its intersection with the 122d meridian east of Greenwich.

<sup>18</sup> For correspondence, see Newchwang, June 30, 1914, to Dept. of State; Tokyo, July 4, 1914, to Dept. of State; Newchwang, July 6, 1914, to Dept. of State; Tokyo, Oct. 8, 1914, to Dept. of State; Dairen, Oct. 9, 1914, to Dept. of State; Newchwang, Oct. 17, 1914, to Dept. of State.

<sup>19</sup> Article VII. See MacMurray's *Treaties*, Vol. I, p. 523.

Had Secretary Knox known of this secret agreement, he might have hesitated to give active support to the proposed Chinchow-Aigun Railway or to suggest the internationalization of all railways in Manchuria. What his efforts brought about was a further agreement between Russia and Japan, which, to emphasize its animus, was signed on July 4, 1910. But, instead of the published text, we find a summary of its contents to be as follows:

ARTICLE I. Recognizes the line established in 1907 as delimiting the spheres of the special interests of Russia and Japan in Manchuria.

ARTICLE II. Russia and Japan engage to respect reciprocally their special interests in these spheres and "recognize in consequence the right to take freely, each in its own sphere, all necessary measures to safeguard the defense of these interests."

ARTICLE III. Each Power engages not to interfere in the "consolidation and future development" of the special interests of the other in the spheres mentioned.

ARTICLE IV. Each engages to refrain from political activity in the sphere of the other.

ARTICLE V. The two Powers agree to communicate with each other with respect to their common interests in Manchuria, and, if these interests are menaced by a third Power, to consult as to measures to be taken for their protection.

This clearly closes the open door and also permits each of the two Powers to take such measures of a political character as it likes in its own sphere. The "third Power," of course, was the United States.

The third treaty was signed at St. Petersburg on July 8, 1912, about the time that Russia was intriguing at Urga to persuade the Mongols to separate from China. A summary follows:

ARTICLE I. The line established by the secret treaty of 1907 is extended as follows: From the point of intersection of the river Tolaho with the 122d meridian east of Greenwich, the line of demarcation above-mentioned follows the course of the river Moushisha as far as the watershed of the river Moushisha and of the river Haldatai; from there it follows the frontier line of the province of Hei-loung-chiang and of Inner Mongolia so as to reach the extremity of the frontier of Inner and Outer Mongolia.

ARTICLE II. Inner Mongolia is divided into two parts by the meridian of Peking (116° 27' east of Greenwich). Russia recognizes the special interests of Japan east of this meridian and Japan recognizes reciprocally the special interests of Russia west of that meridian.

Thus originated the phrase "Eastern Inner Mongolia," a geographical term unknown to China until the Twenty-one Demands were presented. The treaty extended the spheres of the two Powers so as to divide, not only Manchuria, but Mongolia as well, into fields for economic and political exploitation by Russia and Japan.

As one reviews the events that followed 1912, there seems good reason to accept as substantially accurate the information given in these summaries.

It is impossible in this paper to discuss all the numerous instances in which Russia and Japan violated the obligations which they had assumed in treaties with China or with each other, but it is important to consider the recent charge by Japan that China does not observe her treaties.

One of the treaties to which Japan refers is probably that of December 22, 1905. Japan asserts that a secret article in that treaty pledged China not to construct, prior to the recovery by her of the South Manchuria Railway, any main line in the neighborhood of and parallel to that railway, or any branch line which might be prejudicial to the interest of the above-mentioned railway.

China denies that any such secret article was ever signed by her commissioners. This alleged agreement was quoted by Japan in 1909 in opposing the construction of the proposed Chinchow-Aigun Railway. Whatever may be the truth with respect to the alleged secret article, China has built a railway from Chinchow to Tsitsihar which may be said to parallel the South Manchuria Railway, even though it is not in its neighborhood. That it injures the revenues of the South Manchuria line is evident when it is known that through trains were running from Peking to Tsitsihar over this route before Japan's invasion of Manchuria interrupted such activities. China has also built branch lines that compete with those of the South Manchuria Railway, notably a line from Mukden to Kirin. On the other hand, it may be noted that these lines were built for the most part with Japanese money, and that in good degree they served as feeders to the Japanese lines, since the Chinese lines had no seaport in Manchuria that could compete with Dairen. Recently considerable progress has been made in the construction of a rival port at Hulutao, which will have considerable advantage over Dairen since it can be reached from northern and western Manchuria by a shorter railway haul than is necessary in the case of Dairen. This fact and the decrease in the revenues of the South Manchuria Railway may have had something to do with the present quarrel between China and Japan.

Other treaties to which Japan may have referred in her charge that China will not observe them are probably those that grew out of the Twenty-one Demands of 1915. One of these treaties is directly concerned with Japan's position in Manchuria.

As is pretty generally known now, the Twenty-one Demands, afterwards increased to twenty-four, were presented to China during the World War, when the eyes of men were turned toward Europe rather than the Far East. It was a time of peace between China and Japan, and the demands were not made for the settlement of any outstanding questions, nor was any *quid pro quo* offered to China in exchange for the extremely valuable concessions that were demanded. They were presented in an unusual manner, directly to the President without employing the ordinary channel of communication through the Ministry for Foreign Affairs, and the President was

warned not to disclose the demands to other governments on the pain of serious consequences to China.

The demands relating to Manchuria and those concerned with Eastern Inner Mongolia, as originally presented to China, were identical; the two regions were treated as one. To this the Chinese Government objected, pointing out that the conditions in the two regions were entirely unlike, that the Mongols, for the most part, were nomads and unused to modern ways, so that the development of their territories would have to be undertaken slowly and with care. The demands affecting Eastern Inner Mongolia were accordingly modified and separated from those that concerned Manchuria. This raised the total number of the demands to twenty-four. In the end, however, Japan accomplished her purpose of bringing Eastern Inner Mongolia within the sphere of her influence, as agreed upon in the secret treaty of 1912 with Russia. This region is identical with Jehol, one of the five new provinces recently created by the Nationalist Government. The Manchu Kuo (*i.e.*, Manchu State or Manchuria) just brought into existence by Japan, very naturally, therefore, includes the province of Jehol, which originally did not belong to Manchuria.<sup>20</sup>

The demands thrust so unceremoniously upon China were in clear violation of Japan's pledges to respect the territorial integrity and administrative independence of China and to maintain the policy of the open door. In their original form they required Japan's consent before China granted to other nationals the right to construct railways or finance the construction of railways in Manchuria or Eastern Inner Mongolia, and also demanded that Japan's consent be obtained before any agreement should be made with any other Power for a loan secured upon the taxes in these two regions.

They, moreover, required China to consult first with Japan if any political, financial, or military advisers or instructors should be wanted. Where there were many Japanese residing in China, Japan asked that the police be under joint administration of the two governments. China was to be bound also to purchase a certain quantity of arms from Japan, or Japan was to be permitted to establish an arsenal in China under joint management. Many other privileges of great value and of an economic character were asked. After four months of discussion, the tone of the demands was softened, some were withdrawn, and the language of the treaties that were signed was made more diplomatic. But even in its final form the

<sup>20</sup> The Manchuria now placed under the government of Pu-yi, formerly the Emperor of China, consists of four provinces; Heilungkiang, Kirin, Shengking (now called Liaoning), and Jehol. Its total area is 448,957 sq. mi. Manchuria, therefore, is larger than the six states of New England added to New York, New Jersey, Pennsylvania, Maryland, Delaware, District of Columbia, Virginia, West Virginia, Ohio, Michigan, Indiana and Illinois, *i.e.*, larger than eighteen of our states. It has a fertile soil and bracing climate. It is watered by five great rivers and is rich in mineral resources. Placed on our Atlantic seaboard in the same latitudes, it would extend from Norfolk, Va., to the northernmost point of Newfoundland. Its longest axis east and west would reach from New York to St. Paul.



treaty relating to Manchuria was a serious encroachment upon Chinese sovereignty and administrative independence. The preferences as to the employment of Japanese capital for railway construction or for other loans secured upon taxes there were retained, as was the preference to be given Japanese as advisers or instructors in political, financial, military and police affairs. And it must not be forgotten that all the privileges granted were granted under duress, that no *quid pro quo* was offered, that they were extorted by a threat of war. An ultimatum was presented to China; she was allowed 51 hours in which to make up her mind, and two divisions of troops had already been landed, ostensibly to replace others whose time had not yet expired. Even the extension of the leases to the Kwantung Peninsula and to the South Manchuria Railway was granted unwillingly. The Chinese Government in its explanatory statement said:

Owing to the bitter experiences which China sustained in the past in connection with the leased portions of her territory, it has become her settled policy not to grant further leases nor to extend the term of those now in existence. Therefore, it was a significant indication of China's desire to meet Japan's wishes when she agreed to this exceptional departure from her settled policy.<sup>21</sup>

Probably the chief reason for Japan's remarkable action in the matter was the desire to have these leases extended. That to the Kwantung Peninsula was due to expire in 1923. Some years earlier Japan had attempted to obtain a loan for the development of her interests in Manchuria, but had failed because her lease would so soon expire. She obtained the extension asked and has since expended hundreds of millions of yen in exploiting the region; in building more railways, opening mines, building hotels, hospitals and schools, and otherwise promoting the welfare of the inhabitants of the leased territory and the railway zone. But China has never recognized the validity of the treaty under which these vast concessions were obtained. Naturally China has not been disposed to assist Japan to enjoy the gains obtained by such questionable methods. It is worth noting that when Japan accused China of not observing her treaties, she herself was guilty of violating other treaties in forcing China to sign those of 1915. China has repeatedly protested against the recognition of these treaties. This was done at the Peace Conference at Paris; it was done also at the Washington Conference in 1922. I have already elsewhere given an account of the treatment accorded these treaties at the Peace Conference at Paris in 1919.<sup>22</sup> The treaty whose enforcement Japan demanded there was that relating to Shantung, but since both that and the one concerning Manchuria grew out of the Twenty-one Demands and are both open to the same objection, the attitude of the conference toward the one should determine the status of the other.

<sup>21</sup> Sino-Japanese Negotiations of 1915, Carnegie Endowment for International Peace, Pamphlet No. 45, p. 68.

<sup>22</sup> In the University of California Chronicle, January, 1932, "Japan's Interest in Manchuria."



The Council of Three of the Peace Conference having asked the experts on Far Eastern Affairs to report which course would be least injurious to China,—whether to enforce the treaty of 1915, or merely grant to Japan the same rights in Shantung as were enjoyed by Germany, the experts reported unanimously that it would be less injurious to China to grant the rights formerly enjoyed by Germany than to give recognition to the treaty of 1915. President Wilson was the only member of the Council of Three who was not already pledged by the secret treaties of 1917 to support Japan's claim to the rights formerly enjoyed by Germany in Shantung. He repeatedly urged upon the Japanese delegates, as the minutes show, to be more just to China, but it was of no avail; the Japanese would have their "pound of flesh." President Wilson urged Secretary Lansing to talk with Viscount Chinda and attempt to persuade him to modify his attitude. Secretary Lansing asked me to attend a meeting with Chinda at 9:15 p. m., April 26, in the Secretary's office at the Hotel Crillon. The Secretary labored for an hour or more in an endeavor to find a compromise that would save the *amour propre* of China and Japan, but Viscount Chinda would listen to no modification of the terms agreed to in the treaty of May 25, 1915. "Japan's honor," he said, "required the exact fulfillment of that convention." He did not, however, obtain that, for the Council adopted the course recommended by the experts, and in consenting to the action, President Wilson on April 29, 1919, placed on record his declaration that "nothing he had said should be construed as a recognition of the notes exchanged in 1915 and 1918 between Japan and China."<sup>23</sup> He repeated this statement the next day to the Japanese delegate who attended the Council meeting and who was insisting upon the validity of the 1915 treaties. After his return to the United States, while the peace treaty was still pending in the Senate, he emphasized this resolution. The Japanese Ambassador was insisting upon the right to invoke the agreements of 1915 and 1918 in settlement of the Shantung question. President Wilson instructed the Secretary of State to inform the ambassador that the assent of the American delegation to the Shantung clauses of the treaty was conditioned upon non-recognition of the treaties of 1915 and 1918, and that, if the ambassador was unwilling to comply with this condition, the President might be obliged to consider the necessity of withholding support of the clauses. The President also intimated the possibility of raising the question of the validity of such agreements.<sup>24</sup>

China and Japan are both members of the League of Nations. Article X of the Covenant of the League provides as follows:

The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such

<sup>23</sup> History of Treaty of Versailles, Minutes of Meeting of Council of Three on April 29, 1919.

<sup>24</sup> Memorandum, Secretary of State to Japanese Ambassador, Aug. 27, 1919.

aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.<sup>25</sup>

Here is an obligation not only to respect the territorial integrity of members of the League, but to *preserve* it as against external aggression. Japan has in various treaties and conventions repeatedly recognized Manchuria to be a part of China, yet she has within a few months past by military operations overthrown the local government of Manchuria, detached Manchuria and the province of Jehol from China, and set up a new government there.

The Nine-Power Treaty signed at Washington, February 6, 1922, likewise provides that the signatories shall respect the sovereignty, independence, and the territorial and administrative integrity of China, and pledges them not to take advantage of conditions in China to seek special rights or privileges which would abridge the rights of subjects or citizens of friendly states.<sup>26</sup>

The "conditions in China" which justified the pledge of 1922 still require the observance of that pledge, although China has made considerable progress during the decade just passed towards the establishment of a modern and efficient government. Civil strife still continues, and added to this are the horrors attending unprecedented natural calamities and human suffering. China's neighbor has taken advantage of the disorder, weakness and distress to violate the territorial integrity of China and to seek special advantages for herself.

The Pact of Paris, sometimes called the "Kellogg Pact," was signed by China and by Japan. It binds the signatories to renounce "war as an instrument of national policy." Japan denies that she was waging war by her invasion of Manchuria, yet all the arms of warfare were employed and all the horrors that attend war were present. There could not have been more warlike operations than those undertaken, had war been declared. Apparently the only feature of real war that was lacking was the withdrawal by the two states of their diplomatic and consular representatives from enemy territories. It is plain that the refusal to make a formal declaration of war was a skillful bit of camouflage designed to mislead the world. That this undeclared war was used "as an instrument of national policy" seems highly probable when the past 38 years of Japanese history is reviewed. The program of imperial expansion conceived in 1854, which was to bring the annexation of Kamchatka, the Kuriles, the Loochoos, Formosa, Korea and Manchuria, called for the forging of a splendid war machine. In 1894 this machine was ready and war was provoked with China. It ended in the annexation of Formosa and the Loochoos, in the separation of Korea from China, in pledges to maintain the independence of Korea, followed by subjection of Korea and its annexation, and that followed by war with Russia

<sup>25</sup> Text of Covenant of League of Nations.

<sup>26</sup> Official Report of Washington Conference, text of Nine-Power Treaty.

and the acquisition of special rights in Manchuria. At every opportunity afforded Japan, she has taken a step forward upon the path of imperial expansion. This invasion of Manchuria has, for the present at least, detached Manchuria and Jehol from China. An alleged independent state has been set up there, but already it shows itself unable to stand without Japan's help. Can any one doubt that the undeclared war is conducted as an instrument of national policy? Of course we know that there are statesmen in Japan as in other lands who abhor war, but we know also that under Japan's present constitution these statesmen have no way of compelling the adoption of their views.

There is one other treaty to which I must call attention, one that has to do with the new Russia, the Union of Soviet Socialist Republics. On May 31, 1924, the Government of the Republic of China entered into a treaty with the Union of Soviet Socialist Republics, in which Article VI contains the following stipulation:

The two contracting parties mutually pledge themselves not to permit, within their respective territories, the existence and/or activities of any organizations or groups whose aim is to struggle by acts of violence against the governments of either contracting party.

The two contracting parties further pledge themselves not to engage in propaganda directed against the political and social systems of either contracting party.

Notwithstanding the plain terms of this agreement, the Chinese Government discovered that Russian Communists were using their positions on the Chinese Eastern Railway to disseminate propaganda aiming at the overthrow of the Nationalist Government of China. On the 27th of May, 1929, the Manchurian authorities raided the Russian Consulate at Harbin and discovered a meeting of the Third Internationale being held. Some eighty persons were arrested, some of them men of prominence and official position. Despite the attempts of those attending the meeting to burn documents of an incriminating character, the Chinese authorities succeeded in rescuing quite a lot, sufficient to establish the charges against Russia. After months of correspondence, with complaints and counter complaints and border raids from both sides, a new agreement was signed at Khabarovsk in December, 1929, which established a temporary *modus vivendi*, under which the railway is still functioning. But the agreement has not yet been ratified by the central Government of China. Here we are presented with another case in which solemn obligations were assumed only to be ignored.

The record is not complete, but it would seem to be sufficient to convert a born optimist into a cynic. What are international compacts worth, if they can be flouted with such easy unconcern? There can be no international coöperation to establish and preserve world-wide peace unless the nations manifest good faith and mutual trust. Is there a difference between East and West in ethical standards? Not at all. Robbery, murder and all

other anti-social conduct are condemned there as well as here. Confucius was the great moral teacher of the Orient, once as highly honored in Japan as in China. In conversation with some of his disciples he likened good faith to the collar bar by which two horses are yoked together to pull the carriage. Without it there can be no team work, and without mutual good faith and confidence there can be no coöperation among the nations. But there is a theory that has drifted from the West to the Orient that the state is non-moral, that whatever the state may do for its own aggrandizement is right. That is a pernicious theory. Every independent state is sovereign in its own territories and there is no super-state to call it to account for its derelictions and transgressions. But that does not justify its piratical raids upon its neighbor's ports. The broken treaties that have led to strife, bloodshed and rapine in the beautiful valleys of Manchuria should convince us that international agreements for the preservation of peace are of little avail if they depend only upon moral suasion or public opinion for their enforcement. Where good faith is lacking, the international agreement must be backed by international force if it is to be of avail.

Eight months have passed since the invasion of Manchuria began and a new state has been set up there. China appealed promptly to the League of Nations, believing that the invader would be called to account. Was she indulging in one of her pipe dreams? The net result is that a commission has been sent to China to discover facts that an unprejudiced press published months ago, and that good advice to withdraw troops has been given but not acted upon except in a limited degree.

The Chinese Republic was established twenty years ago. Suppose that China had employed those twenty years in fortifying her coasts, building a navy, and organizing her surplus man-power in a well-equipped army, instead of engaging, as she has, in internecine strife, does any one suppose that this invasion would have taken place? The world has not yet reached that condition where any nation can depend entirely upon the good faith of its neighbors for its own security. Self-help is the best help. The old philosopher, Lao Tzu, said: "Weapons of war are unblest tools." It is true, but there are worse things than war, however much we hate it for its folly and its cruelty. Injustice, oppression and slavery are worse than war. As against these war is righteous.

We deceive ourselves if we think that wars of conquest have come to an end. In 1914 we felt sure that the "thousand years of peace" had already begun, but we awoke in midsummer from our dream. Manchuria is probably lost to China, just as Korea was lost; what will be the next step? Suppose the vision of the alleged Tanaka memorial were to be fulfilled and Japan were to take charge of China. The Chinese make good soldiers, as the struggle at Shanghai disclosed. Think of Japan in possession of the vast resources of China and commanding an army composed of her surplus men; what a menace to the peace of the world! Do you imagine that the

Chinese would not make loyal Japanese subjects? Japan annexed Formosa in 1894, and, except for the months immediately following occupation, there has never been any discontent among the Chinese inhabitants. In 1644 China was engaged as now in civil strife. One Chinese general joined with Manchu invaders and conquered his own people in behalf of the foreign ruler. And from 1644 to 1912 the most brilliant Chinese served the Manchu dynasty with loyalty and efficiency. In 1912 I assisted in a conversation with Dr. Sun Yat-sen at Peking. Some one asked: "What about Manchuria?" "Oh! Let the Japanese have Manchuria," was his reply. In those days Canton hated Peking more than it hated Tokyo. May it not be possible that sectional and party wrangling will lead once more to a preference for the rule of a stranger to that of one's fellows?

But there are patriotic Chinese who would die by their own hands rather than submit to such rule. And the world cannot afford to see eastern Asia dominated by a single Power. What then? The international agreements that would preserve the territorial integrity of the signatories and that aim to abolish aggressive war, must be enforced by the military strength of the member nations. Otherwise it seems to me that they are vain.

Mr. HORNBECK (Presiding). That spirited paper of Professor Williams gives us a very good background against which to proceed with outlining the subject of the enforcement of treaty obligations. Professor Quigley, of the University of Minnesota, will open the discussion.

## ENFORCEMENT OF TREATY OBLIGATIONS BY SELF-HELP AND SELF-DEFENSE

BY HAROLD S. QUIGLEY

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Upon the basis of inadequate investigation, I would offer the following tentative conclusions for the consideration of the round-table:

- (1) Self-help is generally regarded by authorities as a legal recourse under customary international law for the enforcement of treaty obligations.
- (2) The weight of opinion regards coercive methods of self-help short of war, when necessary in self-defense, as justified by international law. Authorities differ regarding the legality of such measures.
- (3) Coercive methods of self-help, short of war, if interpreted as pacific, though non-amicable, are not prohibited by the Kellogg-Briand Pact.
- (4) Coercive methods of self-help, short of war, are not, in terms, prohibited by the Covenant of the League of Nations. However, even if permissible, such methods are subject to discontinuance by the Council or Assembly.



## SELF-HELP AS A LEGAL RECOURSE

Borchard may be quoted as typical of views upon this point: "Self-help, tempered by the peaceful instrumentalities of modern times, such as arbitration, is the ultimate sanction of international obligations."<sup>1</sup> Stowell writes: "These, then, are the three methods of procedure for the enforcement of international law: sovereignty; interposition; and self-help."<sup>2</sup> Fenwick says that "international law recognizes the right of self-help on the part of individual states as a sanction for the protection of alleged rights."<sup>3</sup> He qualifies his statement by reference "to the obligations assumed by the member states under the Covenant of the League of Nations." Hyde defines "an act of self-defence" as "that form of self-protection which is directed against an aggressor or contemplated aggressor," and he states that "no act can be so described which is not occasioned by attack or fear of attack."<sup>4</sup>

## COERCIVE METHODS OF SELF-HELP SHORT OF WAR

Mr. Hill, Acting Secretary of State, affirmed in 1900 "the right which this Government has always held, and which on occasion it has exercised, in China and in other countries to land forces and adopt all necessary measures to protect the life and property of our citizens, whenever menaced by lawless acts which the general or local authority is unwilling or impotent to prevent."<sup>5</sup> Wilson holds that "in face of actual dangers immediately threatening its existence, a state may take such measures as are necessary for self-preservation, even though not sanctioned by international law," and quotes Webster's dictum that such measures must arise from "a necessity of self-defense, instant, overwhelming, and leaving no choice of means and no moment for deliberation,"<sup>6</sup> which Westlake<sup>7</sup> characterizes as "good law, except as to the emergency's leaving no moment for deliberation."

One finds difficulty in reconciling statements of Oppenheim upon coercive methods that may be taken as of legal right and those that are "admissible" or "excusable." To him there is no fundamental right of self-preservation, and while "in certain cases violations committed in self-preservation are not prohibited by the Law of Nations, . . . nevertheless they remain violations."<sup>8</sup> Yet, among interventions "which take place by right" is one in pursuance of the "right of protection over citizens abroad" in which "it matters not whether protection of the life, security, honor or property of a citizen abroad is concerned."<sup>9</sup> Reprisals, he believes, are admissible in cases of non-compliance with treaty obligations "or any other internationally illegal act," and by way of reprisal, territory may be militarily occupied,

<sup>1</sup> Diplomatic Protection of Citizens Abroad, p. 177.

<sup>2</sup> Intervention, p. 6.

<sup>3</sup> International Law, p. 381.

<sup>4</sup> *Ibid.*, I, p. 106.

<sup>5</sup> Moore, Digest of International Law, II, p. 402.

<sup>6</sup> Wilson and Tucker, International Law, p. 77.

<sup>7</sup> International Law, I, p. 313.

<sup>8</sup> *Ibid.*, I, pp. 256-7.

<sup>9</sup> *Ibid.*, p. 266.



goods belonging to a state or its citizens may be seized, officials or citizens may be arrested, but not punished.<sup>10</sup>

While recognizing that "the reason of the thing . . . makes it necessary for every state to judge for itself whether a case of necessity in self-defense has arisen," Oppenheim states that "no state is allowed to make use of compulsive means before negotiation has been tried;" that "even at their worst" compulsive measures are "confined to the application of certain harmful measures only," that "reprisals must be in proportion to the wrong done, and to the amount of compulsion necessary to get reparation," and that a state must cease to apply compulsive means if the other party declares itself ready to settle the dispute in the manner desired.<sup>11</sup>

Hyde, Hall, Hershey, Borchard and other authorities recognize that coercive methods of self-help are not unlawful, though no one of them gives them a clean bill of legality. Borchard refers to the "difficulty" involved in the fact that "powerful states have at times exacted from weak states a greater degree of responsibility than from states of their own strength," but he says that "fundamental principles have in the course of time, through a constant growth in the number of cases of protection and of international claims, become more clearly defined."<sup>12</sup> Lord Cecil, replying in the Council to Guani and Branting, who questioned whether "measures of coercion were recognized before the coming into force of the Covenant," admitted that "there has been a certain school of jurists which has disputed the legality of such proceedings but the practice of taking them has been, unquestionably, very widespread . . ."<sup>13</sup>

#### SELF-DEFENSE UNDER THE KELLOGG-BRIAND PACT

The pact, Article II, reads: "The High Contracting Powers agree that the settlement or solution of all disputes or conflicts, of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means." According to Oppenheim, compulsive measures short of war are pacific measures, though non-amicable. Under this interpretation, the pact does not bar recourse to coercive measures of self-help. The same conclusion, moreover, follows if the pact is interpreted to permit war in self-defense.

This conclusion is not in contradiction of Secretary Stimson's letter to Senator Borah, in which we find this sentence:

It is not necessary in that connection to inquire into the causes of the controversy or attempt to apportion the blame between the two nations which are unhappily involved; for regardless of cause or responsibility, it is clear beyond peradventure that a situation has developed which cannot, under any circumstances, be reconciled with the obliga-

<sup>10</sup> International Law, II, pp. 84, 87-88.

<sup>11</sup> *Ibid.*, I, p. 258; II, pp. 5, 80, 89.

<sup>12</sup> Diplomatic Protection, p. 177.

<sup>13</sup> League of Nations Official Journal, 4th Year, pp. 1329-1339.

tions of the covenants of these two treaties, and that if the treaties had been faithfully observed such a situation could not have arisen.<sup>14</sup>

Mr. Stimson did not deny the justifiability of self-help, but rather affirmed that the measures taken in the name of self-help had gone beyond those justifiable under the covenants of the Nine-Power Treaty and the Kellogg-Briand Pact.

#### SELF-HELP UNDER THE COVENANT OF THE LEAGUE OF NATIONS

Following the settlement of the Italo-Greek controversy in 1924, the following question was submitted, among others, to a special commission of jurists composed of Messieurs Adatei, Buero, de Castello Branco Clark, Fromageot, von Hamel, Rolandi Ricci, Uden, de Villa Urrutia, de Visscher and Lord Buckmaster:

Are measures of coercion which are not meant to constitute acts of war consistent with the terms of Articles 12 to 15 of the Covenant when they are taken by one Member of the League of Nations against another Member of the League without prior recourse to the procedure laid down in these articles?

The reply was somewhat oracular:

Coercive measures which are not intended to constitute acts of war may or may not be consistent with the provisions of Articles 12 to 15 of the Covenant, and it is for the Council, when the dispute has been submitted to it, to decide immediately, having due regard to all the circumstances of the case and to the nature of the measures adopted, whether it should recommend the maintenance or the withdrawal of such measures.<sup>15</sup>

The Council accepted the reply unanimously.

"Thus it is put plainly on record by this Committee of Jurists," writes McNair, "that the obligation of Article 12 of the Covenant, 'in no case to resort to war until three months after the award by the arbitrators or the judicial decision or the report by the Council' is not necessarily violated by the use of 'coercive measures' even when . . . those coercive measures involve the application of force."<sup>16</sup> McNair recommends "that this defect [the non-inclusion of measures of force falling short of war with actual resort to war as illegal and Covenant-breaking acts except in the circumstances permitted by the Covenant] should be removed either by an amendment or by an interpretative resolution."<sup>17</sup>

De Visscher, a member of the commission, is quoted by Wright as writing privately that in his opinion Article 12 bars resort to all measures of coercion characterized by the use of force, because such measures in them-

<sup>14</sup> Dept. of State Publication, No. 296, 1932, p. 6.

<sup>15</sup> World Peace Foundation Handbook on the League of Nations, VII, 3-4, 1924, pp. 271-2.

<sup>16</sup> Grotius Society Transactions, XI, 1926, pp. 29-50, 43.

<sup>17</sup> *Ibid.*, pp. 45-46.

selves always endanger the maintenance of peace; any act of force which, if applied against a great Power, would inevitably lead to war, is legally the inauguration of war, whatever the strength of the states, and so is barred by the Covenant. Wright, however, does not qualify his own conclusion that: "the answer to Question 4 seems to imply that they [coercive measures short of war] cannot be considered illegitimate under all circumstances."<sup>18</sup> Only two voices, those of Branting, of Sweden, and Guani, of Uruguay, were raised in the Council against the jurists' answer. It appears that the jurists' reply leaves undetermined the status of acts of force and fails even to authorize the Council to determine the validity of acts of self-help, while recognizing its right to terminate resort to them in any case under consideration.

Wright adds: "Articles 10 and 16 of the Covenant are not directly referred to in this answer, but apparently they also do not bar all measures of coercion short of war."<sup>19</sup> Sir Arthur Salter considers that Article X "does not necessarily mean that a state is guaranteed against invasion, but it does mean that it is promised that the *status quo ante* shall be restored. Clearly Japan must evacuate if the Covenant pledge is to be observed."<sup>20</sup>

The "Model Conventions on Mutual Assistance and Nonaggression," which are not yet effective, make exception of "the exercise of the right of legitimate defense," but limit it to situations where the opposing state has failed to keep the agreement in the convention "not to attack or invade the territory of another contracting party" and "in no case to resort to war against another contracting party."<sup>21</sup> Since this convention was written to effectuate the Covenant, we infer that the Covenant does not bar the use of force in self-defense, at least to the degree indicated. And the conventions do not stipulate whether self-defense may be employed *before* or *after* resort to the Covenant agency of settlement.

In the Bulgarian-Greek case, the Council did not censure either party for its use of force in self-defense. Sir Austen Chamberlain, as Council *rapporteur*, however, took occasion to interpret the spirit of the Covenant:

Such incidents as that which has caused our present meeting have sometimes had very serious consequences in the past, when there was no machinery such as that offered by the League for their peaceful adjustment and for securing justice to both parties; but it would be an intolerable thing—I go so far as to say that it would be an affront to civilization—if, with all the machinery of the League at their disposal and with the good offices of the Council immediately available—as this meeting shows—such incidents should now lead to warlike operations instead of being submitted at once for peaceful and amicable adjustment by the countries concerned to the Council, which will always have regard to their honor and to the safety and security of their nations.<sup>22</sup>

<sup>18</sup> Am. Jour. Int. Law, XVIII, p. 541.

<sup>19</sup> *Ibid.*, p. 542.

<sup>20</sup> Contemporary Review, March, 1932, p. 281.

<sup>21</sup> World Peace Foundation Handbook of the League of Nations Since 1920, by D. P. Myers, 1930, p. 267.

<sup>22</sup> World Peace Foundation Yearbook, IX, 1926, 3-4, p. 216.

In reply to a statement of the Greek representative that on several occasions Greece had been called upon to take rapid steps for its legitimate defense, M. Briand said:

It is essential that such ideas should not take root in the minds of nations which are Members of the League and become a kind of jurisprudence, for it would be extremely dangerous. Under the pretext of legitimate defense, disputes might arise which, though limited in extent, were extremely unfortunate owing to the damage they entailed. These disputes, once they had broken out, might assume such proportions that the government, which started them under a feeling of legitimate defense, would be no longer able to control them. The League of Nations, through its Council, and through all the methods of conciliation which are at its disposal, offers the nations a means of avoiding such deplorable events.<sup>23</sup>

In the Bolivia-Paraguay case, the Council stated to the parties that it wished "to emphasize that in its experience it is most important to confine all military measures of a defensive character to those which cannot be regarded as aggressive against the other country, and which cannot involve the danger of armed forces coming into contact."<sup>24</sup>

Dr. K. Yokota, Assistant Professor of International Public Law in the Imperial University of Tokyo, in a lecture on October 15, 1931, which deserves the recognition of scholars for its exhibition of knowledge and courage, criticized Japan's action in Manchuria. In the course of his remarks he pointed to the occupation, within the space of six and a half hours, by Japanese troops of districts from Yingkow to Kirin and all the important cities along the South Manchuria Railway. "These quick and expeditious actions," he said, "could hardly be accomplished without threat of force. And before the occurrence of the incident a certain number of Japanese soldiers moved from Chinchow to Mukden under the pretext of maneuvering. Just about this time the unfortunate incident suddenly happened in Mukden. Anybody can realize that the so-called incident was entirely expected."

He puts this question: "Suppose the alleged destruction of a few meters of track of the South Manchurian Railway was true, the proper action which the Japanese troops could take in self-preservation was a counter-attack upon the intruding soldiers, and the most the Japanese Army could do in the name of self-defense was the occupation of the North Camp." Replying to the contention that the Japanese troops were under the necessity of acting quickly to forestall attack by the 220,000 Chinese troops, Yokota points to the Chinese non-resistance, and declares that "this plea of necessity in self-preservation was a mere pretext and not justified by the facts." He regarded "the acts of the Japanese troops" as "warfare operations which had reached a dangerously high pitch." He criticizes the Japanese Army for aggravating

<sup>23</sup> World Peace Foundation Yearbook, IX, 1926, 3-4, p. 217.

<sup>24</sup> W. H. Kelchner, *Latin-American Relations with the League of Nations*, World Peace Foundation, XII, 1929, 6, p. 183.

the situation after the government had accepted the advice of the League Council of September 22 not to do so. He protests the bombing of Chinchow on October 4, holding that flying over foreign territory was in itself questionable. With reference to the popular Japanese contention that Japan's existence depends upon Manchuria and Mongolia, Yokota concludes: "It is evidently unwise to use operations of warfare for the maintenance of the right of existence," pointing out that on such grounds Japan might claim the right to occupy central China or Central Europe.<sup>25</sup>

Mr. HORNBECK (Presiding). Professor Colegrove will now continue on the subject of "Self-defense and self-help."

#### ENFORCEMENT OF TREATY OBLIGATIONS BY SELF-HELP

Mr. KENNETH W. COLEGROVE (Professor of Political Science, Northwestern University). The development of international government lags far behind national government. Under domestic law, for centuries, self-help has been abandoned as barbaric, but it is still permitted under international law. It is admitted as a sanction for the protection of alleged rights. The international sanction, however, has the same defects as the long abandoned practice of self-help under municipal law. In the first place, a state is judge and executioner of its own cause, and in the second place, smaller and weaker states have no similar remedy against their powerful neighbors. The practice is vicious, and cannot be supported by an adequate philosophy or rationalization. Undoubtedly the legal profession has a duty to point out on every occasion the blatant absurdity of an international régime which permits self-help without collective supervision.

There are, it is true, restraints upon self-help—restraints imposed by the text-books and a few treaties. According to the text-books, not all offenses are of sufficient gravity to warrant self-help. On the other hand, great conflicts in international policy involving the question of national defense countenance this mode of redress. But not until the restraints imposed by text-book writers can be translated into effective universal agreements, guarded by collective agencies for preserving the peace, will international law correspond with the philosophical basis which appeals to the rational mind as the correct order of international society.

Fortunately, we seem to be groping towards a more rational basis. In 1907, Professor Westlake, in speaking of a breach of law on the part of a state with the intention or seek compensation for a legal injury, expressed the following sentiments:

In time of peace such retorsion is not generally justifiable in the forum of conscience unless the complaining state has obtained in its favor the sentence of a court of arbitration, or there are no means of submitting the complaint to arbitration. There may be exceptional

<sup>25</sup> Pamphlet in English translation by F. S. Li.



cases, as where there is reason to expect that a slight and very clear wrong may be remedied by a not very serious counter wrong, with less expenditure of time and trouble than an arbitration would require; or where, the wrong complained of being greater and very clear, retorsion may fairly be employed concurrently with a demand for arbitration. Such exceptions are especially likely to occur where the complaint is that some provision of a treaty has not been observed, and the retorsion consists in not observing some other provision of that treaty or of another treaty between the same states; but there can be no doubt that in the regular course of things remedies should be sought in arbitration before they are sought in self-help.<sup>1</sup>

In other words, the development of international procedure plainly calls for the submission of states to a definite procedure in the settlement of international disputes before resort is had to self-help. Otherwise, self-help becomes unjust aggression and unauthorized redress for international injury. The underlying theory has nowhere been more succinctly stated than in the argument by Venezuela before the Hague Court in 1903, when counsel for Venezuela stated: "It is a fundamental principle of all jurisprudence that before execution of a claim is justified a judicial and impartial investigation of it must have taken place. In other words, the procedure leading to judgment must always precede the employment of the force necessary for the execution of it."<sup>2</sup>

In this respect, modern nations may take a lesson from the Romans, who made magnificent contributions to both public and private law. As Mr. Phillipson has shown us in his *International Law and Custom of Ancient Greece and Rome*, the Romans developed a formal procedure as a preliminary to war.<sup>3</sup> First, there was the *repetitio rerum* or *clarigatio*, the demand for reparation for injustice done to the state, followed by a period of thirty-three days allowed for a reply. If the ensuing negotiations did not result in a satisfactory settlement, there came the *indictio* or formal declaration of war or notification of the decision to resort to forcible measures of self-redress, made by the *fetials* or special envoys on the frontier in the presence of witnesses. This procedure was formal or stereotyped, but for that age, admirable.

Procedure may become a legal fetish. It nearly became so under the Roman law. But in the present state of human society it appears to be the best basis for the development of international law. Fortunately, there is a growing tendency to insist that a prescribed procedure must be followed before resort to self-help or self-defense is permissible. One important step in this direction is the Hague Convention of 1907 concerning the use of force in the collection of contract debts. The contracting Powers agree "not to have recourse to armed force for the recovery of contract debts claimed from

<sup>1</sup> John Westlake, *International Law* (Cambridge, 1907), Pt. II, p. 6.

<sup>2</sup> MacVeagh, Bowen and Penfield, *Before the International Tribunal at the Hague: Great Britain, Germany and Italy against Venezuela*, p. 117.

<sup>3</sup> C. Phillipson, *International Law and Custom of Ancient Greece and Rome* (London, 1911), Vol. I, Ch. XXVI.



the government of one country by the government of another country as being due to its nationals." But an exception is properly admitted. The undertaking is not applicable "when the debtor state refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any *compromis* from being agreed on, or, after the arbitration, fails to submit to the award." Here is the establishment of a procedure. It is a very simple procedure, but admirably phrased. An offer of arbitration must be made and refused before resort to self-help is legal. Furthermore, the complaining state is protected from dilatory tactics by an obstreperous debtor state.

As an instrument of peace, the Kellogg Peace Pact is probably less effective than it might have been because it fails to provide for any procedure. Only by implication does it admit that conciliation, arbitration or adjudication must precede any resort to the use of force in self-defense. The Covenant of the League of Nations more adequately meets the requirements of international society by providing not only a procedure preliminary to self-help, but also collective agencies to obstruct the path of states that ignore this procedure. Some powerful states are not members of the League. In conclusion, it can be said that international law today insists upon some sort of procedure which must be followed prior to resort to self-help and self-defense. Stated in its minimum terms, this procedure requires *bona fide* offers of conciliation, arbitration or adjudication prior to the appeal to force of arms.

Now, as to the Sino-Japanese crisis in Manchuria—the crisis of September 1931. Did the complaining state observe the minimum rules of procedure before resort to non-amicable redress? It has been said that there was little disposition on the part of either China or Japan to come to terms or to reach a compromise regarding treaty rights in Manchuria, and in particular, in regard to the employment of Japanese railway guards. This does not appear to be the case. At the Washington Conference of 1921–1922 the Chinese delegation made a request for some agreement upon the withdrawal of the Manchurian railway guards. The Japanese delegation tendered a somewhat inadequate explanation of their right to maintain the guards and of the necessity to protect Japanese property in this manner. But the conference, at the suggestion of the chairman, decided that the "question as to whether China was able to provide protection would involve a complicated and detailed investigation of facts . . . which could scarcely be undertaken in the committee itself."<sup>4</sup>

Ten years later, on September 17, 1931, it seemed that the Nanking Government and the Japanese Foreign Office had informally reached an agreement to hold a conference to discuss all pending questions regarding Manchuria. According to dispatches published in the New York Times and other papers, the proposed conference was to have been held at Mukden between

<sup>4</sup> Conference on the Limitation of Armament, Washington, Nov. 17, 1921–Feb. 6, 1922 (Washington, Govt. Printing Office, 1922), p. 1048.

Count Uchida, on one side, and Finance Minister T. V. Soong and Marshal Chang Hsueh-liang, on the other side. The existence of the informal agreement has been denied. The *Wai-chiao Pu Kong Pao*, issued by the Department of Foreign Affairs of the Nanking Government, contains no reference to the proposed conference.<sup>5</sup> At any rate, the conference never met, for on the evening of September 18 occurred the explosion on the South Manchurian railway near Peitaying and the subsequent military occupation of Manchuria.

Then followed in rapid succession the Japanese bombardment of the Chinese garrison, the seizure of Mukden, the advance upon Chinchow—despite assurances to the contrary given to the United States—the chasing of bandits in remote regions, the military occupation of the three provinces, the establishment of an independent state of Manchukuo under the boy emperor, Henry Pu Yi, with the assistance of Japanese officials, and finally the appearance of an alarming Japanese propaganda to the effect that Manchuria is and always has been independent of China. The facts regarding these acts are under investigation by the League's Committee of Inquiry. But it is probable that the evidence uncovered by this international commission will not contradict, in essential points, the evidence already presented by enterprising correspondents of the foreign press in China, or the evidence offered by the Chinese delegate in the Council of the League of Nations.

If the episode of Peitaying was provoked by a Chinese aggression—and it is not clear whether the initial attack was by the Chinese or by the Japanese—then the bombardment of the Chinese garrison, the capture of Mukden and even some of the expeditions against the so-called "bandits" might be justified by appeal to the doctrine of "hot pursuit," or the doctrine of the "abatement of an international nuisance." But certainly these doctrines cannot justify the expeditions to Chinchow or the military occupation of all Manchuria. The text-books propose a limitation upon the force employed for self-help, namely, it must not be beyond a reasonable amount to attain the legitimate objects of the intervention. Can it be held with any justification that the legitimate objects of the present intervention extended to the destruction of all Chinese government in Manchuria?

It is obvious that the Chinese contention regarding the invalidity of the treaties of 1915 is irritating to Japan. It is obvious that China's failure to coöperate in Manchuria has been exasperating. Nevertheless, definite steps invoking the proper procedure prior to self-help were incumbent upon Japan rather than China, since the appeal to self-help was ultimately made by Japan. An offer to arbitrate, a proposal to submit the case to the Permanent Court of International Justice, an appeal to the Council or to the Assembly of the League—one of these methods of procedure was incumbent upon Japan by the obligation of treaty and international law. It is not enough to offer as an extenuating circumstance the fact that the Japanese representative in the Council of the League of Nations countered the Chinese

<sup>5</sup> *Wai-chiao Pu Kong Pao*, or Monthly Journal of the Foreign Office (Nanking).

demand for a conference under international supervision with a demand for a conference solely between the Japanese and Chinese Governments. The controversy then had advanced to a stage where conciliation was in the hands of the League, and the resort to self-help had already been made.

In the matter of the Japanese bombardment of Shanghai, the record also indicates that Japan failed to observe the minimum procedure established under international law. The facts, as presented almost without any contradictions in the press of the whole world, are as follows. On January 21, 1932, the Japanese Consul, K. Murai, and Admiral Shiosawa issued a demand upon Wu Te-chen, the Chinese mayor of Shanghai, demanding the suppression of all organizations promoting the anti-Japanese boycott in Shanghai. This was followed by a twenty-two hour ultimatum on January 26. The ultimatum was to expire at six o'clock on the morning of January 28. It was reported in the press, and no Japanese evidence has been offered to the contrary, that a complete surrender to this ultimatum was submitted by Mr. Wu at noon on the twenty-eighth of January.<sup>6</sup> Nevertheless, the bombardment of the Chinese city began on the evening of that day. In fairness to the Japanese side it should be stated that Admiral Shiosawa had landed marines under agreement with the heads of the International Settlement and the mayor of Shanghai. The mistake of the Admiral was in the bombardment of Chapei and the civil population rather than withdrawing his marines and sending for an adequate army when threatened by the advance of Chinese troops. The procedure adopted by the Japanese was certainly not consonant with our canons of international law. The episode indicates the backward condition of an international society which will countenance such a travesty of international justice.

There is one element in this sorry story that must more and more engage the attention of the statesman as well as the jurist. Down to date, international law seems to make no distinction between a government controlled by civil authorities and a government which falls into the hands of military chiefs. Under our doctrine of sovereignty this is a question solely of domestic concern. Some persons appear to hold that China possesses no government, either civil or military, with authority beyond a few provinces. But what about constitutional government in Japan? The surrender of Japanese civil authority into military hands is one of the most significant events of the episode of September, 1931. We have evidence—it even exists in the official record—that the Japanese Foreign Office at times has not been able to speak for the Japanese Army. Such a situation is abhorrent to constitutional government in a civilized society. This is a problem which must seriously concern the statesman and jurist. At present, under our international organization, there seems no solution other than application of sanctions under Article 16 of the Covenant of the League of Nations, and

<sup>6</sup> Compare New York Times, Jan. 23, 28 and 29, 1932, p. 1; London Times, Jan. 22, 23, 28 and 29, 1932, pp. 9, 12, 13; Paris Temps, Jan. 22, 23, 28 and 29, 1932, pp. 1, 2.

such procedure may lead to a revolution in the obstreperous state resulting in the overthrow of the militaristic government. But this is a drastic action which all peace-loving states naturally wish to avoid.

In conclusion, it will not be an exaggeration to say that the Nipponese Government has fallen short of international standards of correct procedure in resorting to self-help, both in Manchuria and Shanghai. The Japanese violation of international canons at this time emphasizes the need for development of a more equitable technique in the matter of resort to self-help and self-defense.

Mr. HORNBECK (Presiding). The next paper is on "Collective rights and duties," by Professor Wright of Chicago.

### COLLECTIVE RIGHTS AND DUTIES FOR THE ENFORCEMENT OF TREATY OBLIGATIONS

BY QUINCY WRIGHT

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The problem of collective rights and duties with respect to treaty enforcement has been discussed particularly in regard to the enforcement of multilateral treaties and treaties for the preservation of peace. Where a treaty is both multilateral and for the preservation of peace, as are the League of Nations Covenant, the Kellogg Pact, and the Nine-Power Treaty, the demand for collective enforcement has been most insistent. Some collective responsibility for the enforcement of obligations based on treaty, or any other source of international law, may be assumed from the existence of a community or family of nations.<sup>1</sup> Nevertheless, practical procedures for making such collective responsibility effective have been most developed in connection with the types of treaties mentioned. The remarkable development of these types of treaties in recent years can be appreciated by

<sup>1</sup> "That commonwealth is best administered, in which any wrongs, that are done to individuals, are resented and redressed by the other members of the community, as promptly and as vigorously, as if they themselves were personal sufferers" (Plutarch, *Life of Solon*, sect. 18). Creasy (*First Platform of International Law*, London, 1875, p. 44) asserts that this maxim "applies to the great Commonwealth of civilized states," and finds some support in Grotius (I, c. 5, sec. 2; II, c. 20, sec. 40; c. 25, sec. 6) and Vattel (Prelim. sec. 22; II, c. 1, sec. 4; c. 23, sec. 283), but admits that Sheldon Amos (*Jurisprudence*, p. 456) goes beyond these authorities in calling for "a general and determined resolution among all states to hold the breaking of a single clause in a treaty by any state as a crime deserving instant and condign punishment at the hands, not of the immediate sufferers alone but of all." Most writers agree that a distinction must be made between serious and minor infractions of treaty or international law in the application of the Solonian maxim to the family of nations. See Oppenheim, *International Law*, 3rd ed., London, 1920, Vol. 1, pp. 225-226; Stowell, *International Law*, New York, 1931, pp. 625-632; Root, *Am. Journ. Int. Law*, 1916, Vol. 10, p. 9; Wright, *Am. Pol. Sci. Rev.*, 1919, Vol. 13, pp. 556-558; *Research in International Law Since the War*, Washington, 1930, pp. 27-29.

a perusal of Hudson's monumental collection of multipartite treaties since the World War,<sup>2</sup> and of Habicht's important collection of pacific settlement treaties, both bipartite and multipartite.<sup>3</sup>

#### I. PRACTICE IN REGARD TO COLLECTIVE TREATY ENFORCEMENT

Although instruments of this type are characteristic of the post war world, yet in the past similar collective instruments for the maintenance of peace have been made, and where they have, provision has often been made for collective enforcement. Reference might be made to the ancient world of Greek city states, resembling in so many respects our own wider world of national states, and to the oath by which the members of the Greek Amphictyonic League pledged themselves "to punish with foot and hand and voice and by every means in their power" members who violated the rules set forth.<sup>4</sup> Or passing to what has sometimes been called the Medieval League of Nations under the leadership of the church, reference might be made to the Truce of God and the Peace of God whereby the church threatened with ecclesiastical penalties any one who fought in certain proscribed times or places.<sup>5</sup>

A distinguished British jurist has recently drawn attention to the analogy between the 12th century family of barons in England and the 20th century family of nations, emphasizing the resemblance between the Assize Novel Disseisin promulgated by King Henry II in 1166, and Article X of the League of Nations Covenant. Sir John Fischer Williams regards both of these instruments as guarantees by the collectivity in the interest of peace to prevent forcible ejection of the present possessor of land.<sup>6</sup> Perhaps an equally cogent analogy could be drawn from the reign of King Henry's son John. Magna Charta has many of the characteristics of a collective treaty binding King John and the barons. It provided that in case the king transgressed the charter and did not correct the transgression within forty days, the barons might "distress and injure him in any way they can; that is by the seizure of the king's castles, lands, possessions, and in such other ways as they can until it shall have been corrected according to their judgment, saving his person and that of his queen and those of his children." The Great Charter provided further that any one else might act with the barons, and that if the king made an agreement by which any of the con-

<sup>2</sup> Hudson, *International Legislation*, Washington, 1931.

<sup>3</sup> Habicht, *Post War Treaties for the Pacific Settlement of International Disputes*, Cambridge, 1931.

<sup>4</sup> Darby, *International Tribunals*, London, 1904, pp. 5-6; York, *Leagues of Nations, Ancient, Medieval and Modern*, London, 1919, p. 5; Walker, *A History of the Law of Nations*, Cambridge, 1899, p. 39; Freeman, *History of Federal Government*, 2nd ed., London, 1893, p. 98 ff.

<sup>5</sup> Krey, *The International State of the Middle Ages*, *Am. Hist. Rev.*, Oct. 1922, Vol. 28, p. 4 ff.

<sup>6</sup> "Sovereignty, Seisin and the League," *British Year Book of Int. Law.*, 1926, p. 36.



cessions of the charter were revoked or diminished, such agreement should be null and void.<sup>7</sup>

Passing down the centuries, we come to a Europe of sovereign states emerging from thirty years of war. Peace was finally provided for in the multipartite treaties of Westphalia, and Article 123 of one of these treaties, that of Münster, obliged "all parties . . . to defend and protect all and every article of the peace against anyone . . . and if it happens any point shall be violated, the offended shall before all things exhort the offender not to come to any hostility, submitting the cause to a friendly composition, or the ordinary proceedings of justice." Article 124 continued, "Nevertheless, if for the space of three years the difference cannot be terminated by any of those means, all and every one of those concerned in this transaction shall be obliged to join the injured party, and assist him with counsel and force to repel the injury, being first advertised by the injured that gentle means and justice prevailed nothing."<sup>8</sup> Of similar character were the collective guarantees of the peace treaties liquidating the Napoleonic Wars provided in the Treaty of Chaumont, the Holy Alliance and the Quadruple Alliance.<sup>9</sup>

Similar proposals figured in the peace plans of Emeruc Crucé, William Penn, St. Pierre and Jeremy Bentham,<sup>10</sup> and similar were the provisions for and practice of collective action by the great Powers to enforce collective treaties relating to the Near East,<sup>11</sup> the Far East,<sup>12</sup> and Africa,<sup>13</sup> during the 19th and early 20th centuries. It is, therefore, not surprising that international law writers have put collective intervention on a special plane. "A somewhat wider range of intervention," writes Hall, "than that which is possessed by individual states may perhaps be conceded to the body of states, or to some of them acting for the whole in good faith with sufficient warrant. . . . There is fair reason consequently for hoping that intervention by, or under the sanction of, the body of states on grounds forbidden to single states, may be useful and even beneficent."<sup>14</sup> Hall, however, believe that states so intervening "are going beyond their legal powers" and that their justification is a "moral one." Thus, apart from special treaty provision, he considers collective intervention legally on the same

<sup>7</sup> Adams and Stephens, *Select Documents of English Constitutional History*, New York 1906, pp. 51-52. This article (61) was omitted in reissues of *Magna Carta* after 1215.

<sup>8</sup> Sayre, *Experiments in International Administration*, New York, 1919, p. 173.

<sup>9</sup> Phillips, *The Confederation of Europe*, 2nd ed., London, 1920, pp. 74, 140, 147, 305.

<sup>10</sup> Darby, *op. cit.*, pp. 30, 57, 74-82, 149. See also Great Britain, Foreign Office, *Peace Handbooks*, London, 1920, Vol. 25, p. 12 ff.

<sup>11</sup> Holland, *The European Concert in the Eastern Question*, Oxford, 1885, p. 2.

<sup>12</sup> Dennett, *Americans in Eastern Asia*, New York, 1922, pp. 663-668, 677-681; Blakelee, *The Pacific Area*, Boston, 1929, pp. 131-138; Whyte, *China and Foreign Powers*, Oxford, 1927, pp. 37-38, 50.

<sup>13</sup> Beer, *African Questions at the Paris Peace Conference*, New York, 1923, pp. 279-286; Dunn, *The Practice and Procedure of International Conferences*, Baltimore, 1929, pp. 99-110.

<sup>14</sup> Hall, *International Law*, 8th ed., Oxford, 1924, pp. 347-348.



plane as individual intervention, to be justified only by special necessities. This view appears to be generally accepted so far as customary international law is concerned.<sup>15</sup> We will, therefore, confine attention to treaty provisions permitting or requiring collective action for treaty enforcement. It should be noted that the problem of enforcement is important in international law only with respect to innovations made in that law by treaty. The habit of observing such rules is not assured by the customary character of the rule itself. Rules of customary international law (apart from the laws of war and neutrality) have been adequately observed, probably more adequately than most rules of municipal law.<sup>16</sup>

The enforcement of a treaty involves three steps: (1) decision whether the treaty is valid, (2) if it is, decision whether its provisions apply to the case in hand, (3) if they do, decision to carry out the obligations these provisions prescribe. Prior to the World War, all three of these decisions were commonly made by a state on its own authority, or by agreement of the two disputing states, sometimes in the form of an agreement in advance to accept an arbitral award.<sup>17</sup> In recent years collective institutions have been established for making certain of these decisions in case of disagreement, and many states have assumed by treaty the obligation to submit to these decisions.<sup>18</sup> The principal collective rights and duties relating to treaty enforcement are thus defined by the instruments creating these new institutions. The League of Nations Covenant, the World Court Protocols, the Washington Treaties, and the Kellogg Pact are applicable to some or all of the states of the Far East. Other instruments, such as the Locarno Treaties, the Inter-American Arbitration and Conciliation Treaties, and numerous bilateral treaties, do not apply to the Far East and will not be considered here.

Treaty provisions for collective enforcement must be distinguished from the treaty provision to be enforced. Often the provisions for collective enforcement and provisions to be enforced are in the same instrument, but not necessarily so. Thus the League of Nations Covenant by providing in Articles XII, XIII and XV procedures for settling disputes, including disputes about treaty interpretation, and by adding in Article XVI a provision for collective action in case a disputing state resorts to war without exhausting these procedures, adds an indirect collective sanction to all treaties between members of the League of Nations. Many treaties, particularly those establishing boundaries and those designed to prevent hostilities, are placed under indirect collective protection by Articles X and XI of the Covenant, while Article XIX provides a collective procedure for modifying "treaties

<sup>15</sup> See Oppenheim, *op. cit.*, pp. 228-229; Hyde, *International Law*, Boston, 1922, Vol. 1, pp. 122-123; Stowell, *op. cit.*, p. 628.

<sup>16</sup> See Brierly, "Sanctions," *Proceedings of Grotius Society*, 1931; Root, *Am. Jour. Int. Law*, Vol. 2, p. 452.

<sup>17</sup> Wright, *Control of American Foreign Relations*, New York, 1922, pp. 209-214; Col. Law Rev., Feb. 1920, Vol. 20, pp. 145-150.

<sup>18</sup> Habicht, *op. cit.*, introduction.

which have become inapplicable," and Article XXI assures "the validity of international engagements . . . for securing the maintenance of peace" anything in the Covenant to the contrary notwithstanding. These provisions have a clear bearing upon the Kellogg Pact, the Nine-Power Treaty, and other treaties which concern the Far Eastern situation. Directly, however, the Covenant applies only to the obligations which it itself imposes, and of these, only those prohibiting breaches of the peace give occasion for the application of collective sanctions.

## II. COLLECTIVE ACTION TO ENFORCE TREATIES IN THE FAR EASTERN SITUATION

The treaties, enforcement of which has been involved in the present Far Eastern situation, are of two types: (1) certain treaties between China and Japan, conferring upon Japan specific rights in Manchuria and other parts of China;<sup>19</sup> (2) certain multipartite treaties by which Japan and other Powers have agreed to respect the territorial and administrative integrity of China, to provide China fullest and most unembarrassed opportunity to develop and maintain for herself an effective and stable government, to renounce war as an instrument of national policy, not to seek the settlement or solution of any dispute or conflict except by pacific means, and not to resort to war until three months after the means of pacific settlement provided by the League Covenant have been exhausted.<sup>20</sup>

With respect to the first type of treaty, disputes have arisen between China and Japan with respect to all three of the issues suggested—validity, interpretation and execution. China has agreed to submit disputes in regard to the interpretation of these treaties, and apparently also of their validity, to the processes of arbitration or judicial settlement suggested in Article XIII of the Covenant, with the implication that she will execute the obligation by which she is found to be bound. She has refused, however, to enter into bilateral negotiations on the subject while she is under military pressure. Japan, on the other hand, has insisted that disputes in regard to the interpretation of these treaties can be settled only by bilateral negotiation, with the implication that the question of their validity cannot be discussed at all. Japan has also insisted that she cannot withdraw her troops from the occupied areas in Manchuria until China agrees "to respect treaty rights of Japan in Manchuria."<sup>21</sup>

Japan is not bound by the optional clause of the World Court Protocol, nor by any bilateral treaty with China requiring her to submit these treaties

<sup>19</sup> These treaties are discussed in detail by Young, *Japan's Jurisdiction and International Legal Position in Manchuria*, 3 Vols., Baltimore, 1931, and in Willoughby, *Foreign Rights and Interests in China*, 2 Vols., Baltimore, 1927, and more briefly in Blakeslee, *op. cit.*

<sup>20</sup> For an account of action to apply these treaties in the fall of 1931, see Wright, "The Manchurian Crisis," *Am. Pol. Sci. Rev.*, Feb. 1932, Vol. 26, pp. 45-76; Lowell, "Manchuria, The League and the United States," *Foreign Affairs*, April, 1932, Vol. 10, pp. 352-368.

<sup>21</sup> League of Nations, Minutes of 65th Sess. of Council, pars. 2913, 2953, 2957.

to arbitration or judicial settlement, but, on the other hand, Japan is bound by the Kellogg Pact not to seek the settlement of any dispute or conflict except by pacific means. The League Council has, therefore, not insisted upon arbitration or judicial settlement of disputes in regard to the Sino-Japanese treaties, although Lord Cecil drew attention to the fact that "disputes as to the validity of a treaty or as to the interpretation of a treaty can now be authoritatively settled by an appeal to the Permanent Court of International Justice at The Hague over which as it happens a Japanese national at the moment presides." The League has supported the Chinese contention that, in view of the anti-war treaties, military pressure must be withdrawn from China before negotiations with respect to the treaty question are begun.<sup>22</sup>

In January the Council, and later the Assembly, accepted competence to consider and report on all phases of the dispute between China and Japan under Article XV of the Covenant, supporting the Chinese contention, over the Japanese objection, that it was a "dispute likely to lead to a rupture." However, the League organs have actually confined their activity, up to adjournment of the Assembly on March 11, to the problem of stopping hostilities.

This leads to the issue with regard to the multilateral treaties referred to. Japan has suggested doubts as to the validity of the Nine-Power Treaty relating to China in view of the disordered state of China, and Secretary of State Stimson has suggested that the validity of the remaining Washington treaties would be in question in case Japan scrapped the Nine-Power Treaty.<sup>23</sup> These, however, have been merely suggestions, and the validity of these treaties seems to be generally accepted. It may be noted that while the League of Nations Covenant provides for its own amendment, the Kellogg Pact and the Nine-Power Treaty relating to China have no such provision, nor do they have any provision for denunciation or expiration. They are, therefore, intended to be permanent, although the provisions of Article XIX of the League of Nations Covenant might be invoked to call upon the League Assembly to declare them, or indeed any of the other treaties relating to the situation, inapplicable. It may be noted that in 1929, at the suggestion of China, the League of Nations Assembly declared that "any member of the League might on its own responsibility, subject to the rules of procedure of the Assembly, place on the agenda of the Assembly the question whether the Assembly should give advice as contemplated by Article XIX regarding the reconsideration of any treaty or treaties which such member considers to have become inapplicable."<sup>24</sup> The precise effect of such a declaration by the League of Nations Assembly is not clear.

<sup>22</sup> League of Nations, Minutes of 65th Sess. of Council, par. 2954.

<sup>23</sup> Japanese note to U. S., Jan. 16, 1932, and Secretary of State Stimson's letter to Senator Borah, Feb. 23, 1932. U. S. Dept. of State Press Releases, Jan. 16, 1932, p. 68; Feb. 27, 1932, p. 201.

<sup>24</sup> League of Nations, Monthly Summary, Oct. 1929, Vol. 1, p. 311.

With respect to the interpretation of these multilateral treaties, question has arisen in regard to a number of words and phrases such as "territorial integrity," "war," "pacific means,"<sup>25</sup> but particularly with reference to the applicability of these treaties in case of military action taken in "self-defense." Japan has claimed that her operations in Manchuria and Shanghai were necessitated for the defense of her nationals and their property in those regions, and the League seems to have recognized the propriety of such a plea by noting the statement of the Japanese representative that his government would withdraw troops into the railway zone "in proportion as the safety of the lives and property of Japanese nationals is effectively assured," and by noting the statement of the Chinese representative that his government would "assume responsibility for the safety of the lives and property of Japanese nationals outside that zone as the withdrawal of the Japanese troops continues and the Chinese local authorities and police forces are re-established."<sup>26</sup> The possibility that self-defense may justify military operations is also suggested by the Council's decision to appoint a commission "to study on the spot and to report to the Council on any circumstances which, affecting international relations, threaten to disturb peace between China and Japan, or the good understanding between them, upon which peace depends."<sup>27</sup> The scope of this commission's investigation appears to go somewhat beyond a study of the facts which might justify defensive measures. It has, however, been suggested in Council discussions that the plea of defense should not "become a kind of jurisprudence in the minds of nations which were members of the League for it would be extremely dangerous," and that the League is competent to determine whether the facts justify the plea of self-defense.<sup>28</sup> The implication has been that as a legal plea, necessities justifying defensive measures are not ultimately decided by the state taking such measures, but by the League, and that the League would apply some such conception as that proposed in the classic statement by Secretary Webster that there must be "a necessity of self-defense, instant, overwhelming, and leaving no choice of means, no moment for deliberation," and further that the measures taken "must be limited by that necessity and kept clearly within it."<sup>29</sup>

The League organs have not suggested any other ground than self-defense which would justify the use of non-pacific means in foreign territory without express treaty authorization, and M. Briand suggested in the Council that "public opinion would not readily admit that the military occupation under these circumstances (to settle a dispute) could be regarded as

<sup>25</sup> Wright, "When Does War Exist?" *Am. Journ. Int. Law*, April, 1932; "Effects of the League of Nations Covenant," *Am. Pol. Sci. Rev.*, Nov. 1919, Vol. 13, p. 559.

<sup>26</sup> League of Nations, Council Resolution, Sept. 30, 1931, Min. 65th Sess. of Council, par. 2913.

<sup>27</sup> Council Res. Dec. 10, 1931, *ibid.*, par. 2964.

<sup>28</sup> *Ibid.*, par. 2912.

<sup>29</sup> Moore's *Digest of International Law*, Vol. 2, pp. 409-411.

coming under the heading of pacific means." <sup>30</sup> This suggestion seems to be supported by Secretary Stimson's statement in his letter to Senator Borah on February 23, 1932, that "it is clear beyond peradventure that a situation has developed which cannot, under any circumstances, be reconciled with the obligations of the covenants of these two treaties (Kellogg Pact and Nine-Power Treaty) and that if the treaties had been faithfully observed such a situation could not have arisen." <sup>31</sup>

The main issue with respect to the multilateral treaties has, however, been the problem, not of determining their validity or applicability, but of assuring their execution.

### III. COLLECTIVE ACTION FOR EXECUTING ANTI-WAR TREATIES

Collective procedure for assuring execution of treaties applies mainly to treaties for the preservation of peace. In other words, such procedures have been designed, not primarily for enforcing treaties as such, but rather for the prevention of violence. The execution of ordinary treaties, once their validity and meaning is determined, is usually left to the good faith of the parties, although the Permanent Court of International Justice is competent to decide upon specific measures of execution in cases properly before it. It may also be added that the treaties ending the World War, like treaties ending other wars, contained various provisions for enforcing certain of the articles.

Leaving aside such special provisions, the League's procedure for assuring execution of treaties for the preservation of peace may conveniently be divided into three types of action designed respectively (1) to settle disputes likely to lead to war; (2) to prevent hostilities present or imminent from developing into war; and (3) to apply sanctions in case preventive efforts fail. This classification of procedures is suggested by the report approved by the League Assembly and Council in 1927, interpreting Article XI of the Covenant. <sup>32</sup> In practice these stages of procedure have generally been separated, and it is clear that it would often be both inconvenient and against principle for the League of Nations or other organization of states to proceed with all three of them contemporaneously.

1. The use only of pacific means in settling international disputes, required in most circumstances by the League of Nations Covenant and in all circumstances by the Kellogg Pact, hardly permits of negotiation between the parties when one is under military pressure of the other. While submission of disputes to arbitration or to the Permanent Court of International Justice in the midst of hostilities is conceivable, it is improbable that a state using force to settle a dispute would be willing to accede to such a procedure. A third possibility exists in settlement through the elucidation of facts and recommendation of settlement by a mediator, a conciliation commission, or

<sup>30</sup> League of Nations, Min. 65th Sess. of Council, par. 2954.

<sup>31</sup> *Supra*, note 23.

<sup>32</sup> League of Nations, Monthly Summary, Oct. 1927, Vol. 7, p. 308; Jan. 1928, Vol. 7, pp. 356, 376-378; Conwell-Evans, *The League Council in Action*, Oxford, 1929, pp. 282-285.



the League of Nations Council or Assembly. The last procedure is actually provided for by the Covenant in disputes on "matters within the sphere of action of the League or affecting the peace of the world" (Art. 3, par. 3; Art. 4, par. 4), disputes concerning "external aggression against the territorial integrity or existing political independence of a member" (Art. 10), disputes which "threaten to disturb international peace or the good understanding between nations upon which peace depends" (Art. 11, par. 2), "disputes likely to lead to a rupture" (Art. 15, par. 1), or disputes concerning "the reconsideration of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world" (Art. 19). Although these provisions permit League organs to consider the merits of disputes in the midst of hostilities, actually the League has been very reluctant to do so.

While Japan suggested during the Manchurian discussions in the Council that settlement of fundamental principles in dispute might be the most rapid road to stopping hostilities, the League organs have felt that satisfactory settlement of such disputes is inevitably a long process and hostilities cannot be permitted to go on for so long a time. Furthermore, a settlement reached during hostilities might be influenced by the military situation rather than by considerations of justice and permanent stability. The League organs have not allowed their energies to be diverted from their primary task of preventing or stopping hostilities.<sup>33</sup> This practice accords with the report approved by the Council and Assembly in 1927, which suggested that consideration of the merits of international disputes be confined to cases "where there is no threat of war or it is not acute." The collective measures urged by this report in such circumstances were consideration of the problem in meetings of the Council attended by the contending parties, request by the Council for an organization or even a private individual to exercise conciliatory functions, suggestion by the Council that such disputes be referred to arbitration or judicial settlement, despatch by the Council of a commission to the spot to report on facts with the understanding that such commission could not go to the territory of either party without the consent of the state to which the territory belonged, and requests for advisory opinions from the Permanent Court, or in special circumstances, from a committee of jurists appointed by the Council.<sup>34</sup>

2. Where hostilities are present or imminent, the League has devoted itself to the problem of preventing war, finding its competence in paragraph 1 of Article XI, although Articles X and XV have also been invoked on some occasions of this type.<sup>35</sup> This paragraph, while not perhaps absolutely barring consideration of the merits of the dispute, minimizes such considera-

<sup>33</sup> League of Nations, Min. 65th Sess. of Council, pars. 2953, 2954.

<sup>34</sup> *Supra*, note 32.

<sup>35</sup> The articles of the Covenant relied on in 24 disputes before the Council are listed by Conwell-Evans, *op. cit.*, pp. 278-280.



tion by confining the League's competence to "action deemed wise and effectual to safeguard the peace of nations." Actually the League's resolutions under this article have been limited to proposals for stopping hostilities, such as withdrawal of troops and measures directly contributory to such end. Article XI, it is to be observed, is not supported by the sanctions of Article XVI, and in the early stages of hostilities the League has confined itself to the bringing of moral pressure. Its preoccupation has been with the two questions of *speed* and *unanimity*. It has been hoped that unanimous admonition, based upon specific treaty obligations of the contending states, offered before hostilities are really serious, may bring results, and in the Greco-Bulgarian dispute of 1925 and certain other incidents this result was achieved. In the Chino-Japanese hostilities which began in September, 1931, unanimity of the Powers immediately interested required coöperation of the United States and Soviet Russia. Precious days were wasted in arranging for coöperation of the United States, and coöperation of the U. S. S. R. appears not to have been requested. Thus speed and unanimity were lacking and satisfactory results were not obtained.

The procedure in cases "where there is an imminent threat of war" has been codified on the basis of the League's experience in the report of 1927,<sup>36</sup> and certain of these rules were developed in resolutions of the Tenth and Eleventh Assemblies (1929, 1930), in regard to "League communications in time of emergency."<sup>37</sup> The Twelfth Assembly (1931), on the basis of studies by the commission on arbitration and security, drew up a "general convention to improve the means of preventing war." This would render the Council's recommendations for the prevention of war obligatory among the contracting states.<sup>38</sup> The procedure provided in these instruments contemplates immediate telegraphic appeals by the acting president of the Council to the parties to refrain from hostilities, meeting of the League Council with the greatest promptitude, recommendations to prevent the spreading of hostilities, conservatory measures relating to the substance of the dispute to prevent its aggravation, and despatch of commissions to the spot to report on the carrying out of the League's recommendations. It is to be observed that this procedure avoids consideration of the substance of the dispute after hostilities have become imminent, except with a view to proposing conservatory measures to prevent its aggravation, and also that the procedure avoids threats of physical sanction until moral pressure has failed. This latter caution is undoubtedly justified by the difficulty of ascertaining the aggressor state until it has disclosed itself by its attitude toward the recommendations of the League addressed to both parties during this preliminary stage, and also by the danger that threats of physical sanctions might solidify the opin-

<sup>36</sup> *Supra*, note 32.

<sup>37</sup> These resolutions dealt with radio, air and motor vehicle communication (L. of N. Monthly Summary, Vol. 9, p. 310; Vol. 10, p. 200).

<sup>38</sup> *Ibid.*, Vol. 11, p. 276.

ion favorable to intransigence in the state against which they are directed, establishing "war psychology" and a united determination by all sections of the population to resist external pressure.

The Nine-Power Treaty and the Kellogg Pact, although imposing negative obligations on their members with reference to violent action in the Far East, do not, like the League of Nations Covenant, impose any duty upon the parties to take positive action in case one of their number violates the agreement. The Nine-Power Treaty does provide for "full and frank communication" between the contracting parties "whenever a situation arises which in the opinion of any one of them involves the application of the stipulations of the treaty."<sup>39</sup> Customary international law seems to acknowledge that every party to a treaty has a legal interest in its execution and, therefore, has a right to take action of a type recognized by international law, individually or collectively with other parties, to enforce the treaty.<sup>40</sup> In accordance with this right, the United States, on the basis of the Kellogg Pact and the Nine-Power Treaty, has coöperated with the League of Nations in its endeavors to stop hostilities and prevent war in the Far East, and like the League, it has thus far confined action to moral pressure through diplomatic representations.

3. This brings us to the problem of collective action for the application of physical sanctions, which is undoubtedly the most delicate phase of international procedure for the enforcement of treaties. The members of the League have agreed to "preserve as against external aggression the territorial integrity and existing political independence" of all other members, and to apply prescribed economic sanctions against other members which "resort to war in disregard of their covenants under Articles 12, 13 and 15." The Council is free to advise "upon the means for carrying out the obligations of members" under Article 10, and "to take any action that may be deemed wise and effectual to safeguard the peace of nations" under Article 11. Articles 10 and 16, while not imposing an obligation upon League members to go to war against the covenant breaker, may permit that extreme action, but the provision in Article 11 clearly does not permit action which would itself prejudice "the peace of nations." As has been pointed out, the Nine-Power Treaty and the Kellogg Pact impose no positive duty to apply any kind of physical sanctions. While a duty to apply sanctions might be implied from the terms of the Four-Power Pacific Treaty of the Washington Conference, that duty would apply only in case "a right in relation to the insular possessions or insular dominions in the region of the Pacific Ocean of one of the Powers were threatened by the aggressive action of

<sup>39</sup> U. S. Treaty Series, No. 723, Art. 7.

<sup>40</sup> "Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it" (Permanent Court of International Justice, Statute, Art. 63).

any other power" and, therefore, does not apply to the Chino-Japanese situation.

The Nine-Power Treaty and the Kellogg Pact, while not providing for physical sanctions, impose no limitations upon the employment of such sanctions against the violating state. According to its preamble, a state violating the Kellogg Pact loses the immunity from war which the pact otherwise entitles it to. It also seems probable that parties to the pact are under an obligation to acquiesce in the employment of sanctions of a kind contemplated when the pact was negotiated, such, for instance, as the sanctions provided for in the League of Nations Covenant, against a state which has violated the pact.<sup>41</sup>

#### IV. THE PROBLEM OF SANCTIONS

The word sanction has often been applied to measures of self-help taken by single states under circumstances which they deem renders such action permissible under international law.<sup>42</sup> It has also been applied to include all social, psychological, and physical conditions inducing respect for law, such as the pressure of public opinion, the inertia of custom and the calculations of self-interest.<sup>43</sup> It is believed that clarity of thought will be promoted if the term sanctions in the present connection is confined to organized sanctions, or positive action which a community has authorized in a particular situation for the purpose of inducing its members to observe the law to which they are bound as members of that community.<sup>44</sup> Sanctions would thus be

<sup>41</sup> Wright, "Neutrality and Neutral Rights following the Pact of Paris," *Proc. Am. Soc. Int. Law*, 1930, p. 82.

<sup>42</sup> "Self-help and intervention on the part of other states which sympathize with the wronged one are the means by which the rules of the law of nations can be and actually are enforced" (Oppenheim, *op. cit.*, Vol. 1, p. 11). "War is the last and the most formidable of the sanctions which in the society of nations maintains the law of nations" (Salmond, *Jurisprudence*, London, 1902, p. 14).

<sup>43</sup> Bentham (*Theory of Legislation*, Chap. 7) included in the term sanctions used in the broadest sense all pleasures and pains which might be anticipated from the violation of a rule, whether from physical, moral, political or religious sources, and anthropologists include in the term unorganized social disapproval, reprobation, ridicule, and retaliation, as well as organized penalties and taboos. In international law the term has often been used in this broad sense, as by Hall (*op. cit.*, p. 13), who notes that in the case of municipal law "a machinery exists for securing obedience, in international law no more definite sanction can be appealed to than disapprobation on the part of the community or a section of it." Potter includes "spontaneous fear of retaliation inducing action by a state" as "an element of external sanctions and not of voluntary discharge of obligations" ("Sanctions and Security," *Geneva Special Studies*, February, 1932, Vol. 3, No. 2, p. 7). See also Root, "The Sanctions of International Law," *Am. Journ. Int. Law*, 1908, Vol. 2, p. 451; Wright, *The Enforcement of International Law through Municipal Law*, 1916, pp. 14, 229; "The Effect of the War on International Law," *Minn. Law Rev.*, 1921, Vol. 5, pp. 440-445; "The Outlawry of War," *Am. Journ. Int. Law*, 1925, Vol. 19, pp. 96-97; *Mandates under the League of Nations*, Chicago, 1930, pp. 216-218.

<sup>44</sup> "Sanctions and guarantees in international law correspond to the means adopted in national law to enforce legal decisions" (Philip J. N. Baker, *Encyclopedia Britannica*, 14th

distinguished from war connoting a struggle between equals. The authority responsible for putting sanctions into effect can only be the community of which the state or other person against which the sanctions are directed is a member, they can only be utilized to enforce a rule which bound the delinquent state or person before his wrongful act, and they must involve positive action taken with the purpose of such enforcement.

Sanctions may be moral, involving appeal merely to the intelligence and good faith of the person, such as the judgment of a court, advice or admonition by suitable authority, or they may be physical, involving promises to employ or actual employment of measures affecting the person's interests in order to control his conduct or to nullify the effects of his illegal acts. Execution against property, fine, imprisonment, corporal or capital punishment, are the best known types of physical sanctions in systems of municipal law.<sup>45</sup>

International law has in the past rested upon unorganized sanctions or organized moral sanctions, and some writers have distinguished international law from municipal law on the assumption that the former was supported by no organized physical sanctions.<sup>46</sup> It has been noted, however, that the League Covenant does organize certain sanctions of a physical character in case of certain gross breaches of the Covenant, and these have usually been classified as economic or as military sanctions.

The difficulty of applying physical sanctions in international affairs has frequently been stressed. The analogy between the family of nations and the state is far from complete. The family of nations, although undoubtedly a community, is less organized and less overwhelmingly powerful *vis-à-vis* its members than is the state. Furthermore, responsibility for wrong-doing by

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ed., Vol. 19, p. 930). Baker points out that as a result of concentration on the problem of security since the war, and the effort to effect it through the League of Nations, the use of force in international affairs has been conceived as analogous to its use within the state, and the word "sanction" has tended to replace the older words "alliance" and "guarantee." (See also Wright, *Research in International Law since the War*, 1930, pp. 28-29.) The following quotations illustrate the concept of sanctions in municipal law: "Those parts of laws by which punishments are established against transgressors" (Justinian, *Institutes*, II, sec. 1, par. 10); "the pleasures and pains which may be expected from the action of the magistrate in virtue of the laws" (Bentham, *Theory of Legislation*, Chap. 7); "intimation that the author of commands will see to their being obeyed; not necessarily by a threat of punishment as such, but also by a promise of interference to prevent disobedience or to reinstitute things in the position in which they were before the act of disobedience" (Holland, *Jurisprudence*, 11th ed., Oxford, 1910, p. 22); "the instrument of coercion employed by any regulative system" (Salmond, *Jurisprudence*, London, 1902, p. 14); "that part of a law which inflicts a penalty for its violation or bestows a reward for its observance" (Bouvier's *Law Dictionary*); "a provision of a law which enforces obedience by the enactment of rewards or penalties" (Century Dictionary); "a provision for securing conformity to law, as by the enactment of rewards or penalties or both" (Standard Dictionary).

<sup>45</sup> The terms moral and physical sanctions have sometimes been used in a different sense to distinguish the anticipated consequences of wrong-doing according as they result from the opinion of the community or from natural causes (Bentham, *Theory of Legislation*, Chap. 7).

<sup>46</sup> *Supra*, notes 42, 43.

a state cannot in fact, although it may in law, be attributed to all members of the delinquent state, yet all such members would nevertheless suffer from the application of most physical sanctions. Physical sanctions in the family of nations, therefore, have less prospect of being effective and more prospect of damaging the whole society than is true within the state. They, in short, as Madison and Hamilton pointed out in the Federal Convention of 1787, are in danger of assuming all of the characteristics of war, in practice and in result, however much they might differ in theory and in initiation.<sup>47</sup>

It should be noted, however, that physical sanctions, like moral sanctions, is a term which covers a considerable variety of action. The objections suggested would not apply as vigorously against an embargo on arms or on loans as against a general embargo, including foodstuffs and raw materials of industry, nor would they apply as vigorously against the latter as against military invasions. Both the effectiveness and the cost of various types of sanction would differ tremendously according to the geographic, industrial and commercial position of the state acted against, according to the extent to which participating states had been forewarned of the nature of the sanctions to be applied and had made preparations in advance to meet them, and according to the degree of unanimity and vigor with which the states of the world coöperate in applying them.

These considerations amply support the practice of the League of Nations in providing for physical sanctions in the background, but in utilizing them only after moral sanctions have failed, only to stop hostilities, and only of a kind adapted to the situation at hand and of the least severity which has prospects of being successful. This caution is indicated by the following quotation from the resolution of 1927 already referred to:<sup>48</sup>

Should any of the parties to the dispute disregard the advice or recommendations of the Council, the Council will consider the measures to be taken. It may manifest its formal disapproval. It may also recommend to its members to withdraw all their diplomatic representatives accredited to the state in question, or certain categories of them. It may also recommend other measures of a more serious character.

<sup>47</sup> Farrand, *Records of the Federal Convention*, Vol. 1, p. 54; Vol. 2, p. 9; *The Federalist*, Nos. 15, 16, 21; Borah Resolution, Feb. 13, 1923, Sen. Res. 441, 67th Cong. 4th sess.; Senate debate, Jan. 22, 1926, Cong. Rec., Vol. 67, pp. 2235-2242; Wright, *Enforcement of International Law through Municipal Law*, 1916, p. 18; "The Outlawry of War," *Am. Journ. Int. Law*, 1925, Vol. 19, p. 98 ff.; "For judgements are efficacious against those who feel that they are too weak to resist; against those who are equally strong, or think that they are, wars are undertaken" (Grotius, *Prolegomena*, sec. 25); Potter Geneva Special Studies, Feb. 1932, Vol. 3, No. 2, pp. 13-19; Moore, *International Law and some Current Illusions*, pp. 309-315; Brierly, "Sanctions," *Publications of the Grotius Society*, 1931; Dewey, "Peace by Pact or Covenant?" *New Republic*, March 23, 1932, p. 145; Acting Secretary of State Castle, "Recent Developments in the Kellogg Pact," Dept. of State press release, May 7, 1932, p. 415.

<sup>48</sup> *Supra*, note 32. See also Rutgers' Memorandum on Arts. 10, 11, and 16 of the Covenant, Feb. 3, 1928, Art. 209, L. of N. Disarmament, 1928, IX, 3, p. 39.



If the state in default still persists in its hostile preparations or action, further warning measures may be taken such as a naval demonstration. Naval demonstrations have been employed for such a purpose in the past.

It is possible that air demonstrations might within reasonable limits be employed. Other measures may be found suitable according to the circumstances of the case.

It should be pointed out that the very general terms of Article 11, "Any action that may be deemed wise and effectual to safeguard the peace of nations," allows any action which does not imply recourse to war against the recalcitrant state. The above mentioned measures have only been given as examples. Circumstances might lead to an alteration in the order of their application. . . .

If, in spite of all steps here recommended, "a resort to war" takes place, it is probable that events will have made it possible to say which state is the aggressor, and in consequence, it will be possible to enforce more rapidly and effectively the provisions of Article 16.

#### V. CONCLUSIONS

It is believed that the experience of the League of Nations which has been discussed supports the following generalizations in regard to collective action to enforce treaties:

1. States cannot effectively implement collective rights and duties with reference to treaty enforcement without a permanent collective political agency.

2. Such collective agency should seek to persuade states to accept permanent obligations to utilize procedures of arbitration, inquiry, conciliation, conference, or other procedures for the pacific settlement of disputes in regard to treaty validity, interpretation, or execution which diplomacy fails to settle.

3. Where serious disputes in regard to treaty enforcement arise, such collective agency should actively urge the use of existing peaceful means of settlement, even making recommendations as to the method which seems most available under the circumstances.

4. If hostilities exist or are threatened, the collective agency should devote itself exclusively to preventing further hostilities by separating the military forces and restoring the *status quo ante*.

5. This effort is most likely to be successful if (a) the collective agency can express a unanimous opinion of all the states of the world in support of the obligations of the disputing state to use only pacific means of settlement; (b) if this opinion can be expressed with the utmost despatch before hostilities have actively begun; (c) if all consideration of the merits of the dispute and of the party at fault are left in abeyance; (d) if appeal is made to the good faith of the disputing states and no threat of physical sanction is employed.

6. If this initial effort fails and active hostilities develop, the states of the world should continue full coöperation through the collective agency



until hostilities have stopped and any advantage gained by such hostilities has been nullified, even though this takes a long time.

7. This effort is most likely to be successful (a) if all of the states indicate their firm intention to continue this coöperation by express declaration; (b) if discussion of the merits of the dispute, of the circumstances which led to the initial hostilities, or of reparations, are held in abeyance until hostilities have stopped and the *status quo ante* has been restored, except in regard to conservatory measures for preventing aggravation of the dispute; and (c) if decision upon which of the states is the aggressor is based exclusively upon the willingness of the parties, manifested before the collective agency, to accept pacific procedures for ascertaining the existence of defensive necessities, for restoring the *status quo* in so far as such necessities are found to permit, and for settling the dispute on its merits thereafter. (d) Furthermore, physical sanctions should not be employed or threatened until a series of moral sanctions of progressive severity, such as admonition, declaration that fruits of aggression will not be recognized, withdrawal of diplomatic representation, have failed, and the aggressor has clearly disclosed itself through the discussion. (e) In case all other means fail, physical sanctions should be employed with progressive severity and with due consideration of the special circumstances of the case, utilizing first those measures such as embargo on arms, raw material for arms manufacture and loans, which affect the capacity of the aggressor to carry on hostilities, then measures such as general commercial embargoes and pacific blockade to bring economic pressure on the entire population of the aggressor state, and only in the last emergency direct military action, although naval demonstrations might be utilized at an earlier stage. (f) General commercial embargo, pacific blockade or military measures should not be utilized except on recommendation of the collective agency after a state is at war in the legal sense contrary to its international obligations.

The last suggestion may seem on its face contrary to Article 16 of the Covenant, which makes the economic sanctions automatic against a League member which "resorts to war in disregard of its covenants under Articles 12, 13 or 15," but in fact it seems unlikely that legal war will exist among League members in the future, except through collective recognition by a third state that *de facto* hostilities have reached a stage where they constitute a state of legal war. It is unlikely that either contending state will admit that it is at war, since such act might render it liable to these sanctions. Legal war can only exist when some state intends to make war, and that intent has been unequivocally manifested either by its own act or declaration or by recognition by the victim or third states that its conduct, in spite of its assertions to the contrary, in fact manifests an intention to make war. Thus, in the future, legal war is unlikely to exist unless the Council or the Assembly of the League recognizes *de facto* hostilities as war.<sup>49</sup> It may be

<sup>49</sup> Wright, "When does War Exist?" Am. Journ. Int. Law, April, 1932.

assumed that League organs will withhold such recognition until they believe that circumstances are opportune for giving effect to Article 16 of the Covenant. In other words, recognition of war and recommendation that the sanctions of Article 16 should be applied would be effected by the same act of the League Council or Assembly.

On the other hand, as pointed out in the League's resolution of 1927, even when there is no war but only a "threat of war," the Council can, under Article 11, "take any action that may be deemed wise and effectual to safeguard the peace of nations which does not imply recourse to war against the recalcitrant state." This would authorize the Council to recommend any of the types of embargo suggested, or even types of military action short of war, prior to its recognition that the recalcitrant state is in a state of legal war. In fact, even if Article 16 is applied, it is not to be anticipated that the members of the League would be at war with the recalcitrant state. The action is one of sanction, not of war, and the procedure could be brought into accord with existing international law through utilizing domestic embargoes and pacific blockades recognized as measures of coercion short of war. Even if military measures are used, they should be denominated collective intervention, authorized by general treaties to which the state against which the intervention is directed has agreed, rather than as war in the legal sense.<sup>50</sup>

It is believed, therefore, that physical sanctions should not be automatic. They should be resorted to only after moral pressure has failed, and on recommendation of an agency representing the collectivity of states when confronted by an emergency. Their character should be adapted to the special circumstance of the case, and should not be elaborated in advance. It should, however, be clearly recognized by prospective aggressors that the possibility of applying them exists in the background, and consequently the executive authority of every state should be armed with power to cooperate in physical sanctions, at least of an economic character, if the collective agency determines that they are necessary in the emergency. On the other hand, there should be full and detailed advance preparation for mobilizing the moral pressure of all nations immediately upon the outbreak or threatened outbreak of hostilities, and to implement such a program the executive authority of every state, party to the Kellogg Pact, should be armed with power to participate in that cooperative program.

It is believed that this program substantially conforms to the policy followed by the United States Department of State during the Sino-Japanese controversy, and that all that is needed to render the program fully effective is, in the first place, passage of a joint resolution by Congress authorizing the President to cooperate with other parties to the Kellogg Pact immediately

<sup>50</sup> Canadian resolution on Art. 10, L. of N., 4th Assembly, Sept. 24-25, 1923; Secretary General of the League of Nations, note on Article 16, May 17, 1927, Pub. L. of N., Legal, 1927, V, 14, p. 83; Wright, "The Future of Neutrality," *International Conciliation*, Sept. 1928, No. 242, pp. 354, 368-369.

upon a violation or threatened violation of the pact, progressively utilizing as circumstances suggest specified sanctioning measures such as admonition, non-recognition of the fruits of aggression, the withdrawal of diplomatic relations, embargo on loans, embargo on arms, embargo on raw materials for arms manufacture, or embargo on all commercial intercourse. This is substantially the effect of the House Joint Resolution introduced on February 13, 1932, by Congressman Morton D. Hull, of Illinois.<sup>51</sup>

After the passage of such a resolution, the President should conclude an executive agreement with the League of Nations providing for immediate participation by an official American representative in the deliberations of the Council or the Assembly of the League whenever the Kellogg Pact has been violated, or such violation is threatened, in order to coöperate in preventing such violation and to continue coöperation until that object is achieved.

It must be emphasized that the procedures for implementing collective treaties here discussed cannot be expected to solve the problem of security at once. In its psychological aspect, that problem is concerned primarily with the certainty of immediate protection from irreparable injury through invasion or bombardment. The prospect of immediate moral pressure on the aggressor, of eventual physical sanctions to thwart his plans, and of ultimate repair of the damage done, has not in fact created a sense of security. Such a prospect may exert a powerful deterrent effect after the world has become convinced of its reality through experience, but in the meantime prospective aggressors may remain unconvinced and may visit serious hardships upon nations that rely on this prospect alone. The average householder in America is not content to rely for security only on his burglary insurance policy, the courts and the sheriff or even on the policeman patrolling his neighborhood, but also locks his front door and sometimes keeps a watchdog and a revolver. The problem of assuring defence from immediate attack involves measures in the immediate vicinity of danger at the instant danger impends. Vague, distant and deliberate agencies do not meet the problem.

Doubtless for a long time states will have to rely on their own defence armaments, strengthened perhaps by disarmament systems that reduce offensive while strengthening defensive weapons, and by regional agreements disarming frontiers or assuring the immediate assistance of neighbors in case of flagrant aggression.<sup>52</sup> The efficiency of such measures, however, depends upon the burden of work they are called on to perform, and that

<sup>51</sup> House Joint Res. 288, 72nd Cong. 1st Sess., substantially incorporating the suggestions of Professor J. B. Whitton ("What Follows the Pact of Paris?", *International Conciliation*, Jan. 1932, No. 276). See also Hull resolution, Feb. 24, 1932, H. J. Res. 317, authorizing an embargo on loans only; Capper resolution, April 7, 1932, Sen. J. R. 140, and remarks of Senator Capper, *Cong. Rec.*, April 21, 1932, reprinting Report of Committee on Economic Sanctions of the Twentieth Century Fund.

<sup>52</sup> Spaight, *Pseudo-Security*, London, 1928, pp. 12-16; Lefebure, *Scientific Disarmament*, New York, 1931.

burden will be steadily diminished as the prospects of successful aggression diminish before collective measures for enforcing treaty obligations.

Mr. HORNBECK (Presiding). The concluding paper will be read by Mr. Harriman, of the Bar of the District of Columbia.

Mr. EDWARD A. HARRIMAN. Mr. Chairman and ladies and gentlemen: As a field for speculative thought, international law, though perhaps less interesting, is far safer than theology. If in theology I maintain a doctrine contrary to that of the authorities of my church, I may be excommunicated for heresy. In international law, on the other hand, if I express an opinion contrary to that of other members of the Society, or even of the executive committee, I run no risk of expulsion from the Society or of any penalty except the disapproval of superior intellects. To illustrate, let me quote a recent statement of a learned member of this Society:

In return for the well deserved prestige acquired through the successful negotiation of the Kellogg-Briand Peace Pact, this nation may rightly be expected to recognize a corresponding moral obligation to show zeal in coöperating to make that instrument something more than a mere expression of good will. In this connection it should not be forgotten that under international law all of the states are obligated separately or collectively, as they may judge best, to coöperate in so far as possible toward the preservation of their common law, and this obviously includes the obligation to resist any act of aggression against the sister state. This obligation exists quite apart from the League Covenant, the Nine-Power Pact or the Kellogg-Briand Peace Pact. These important treaties really do no more than provide the means of sure fulfillment of the obligation through the issue of letters patent, thereby fully recognizing and make more widely known the existing obligation.

It is permitted to me as a less learned member of this Society to take issue with the foregoing statement on every point. First, as to prestige. Prestige rests either on fear or admiration. If anyone thinks that the prestige of the United States at Geneva in 1932 is greater than the prestige of the United States at Paris in 1919, he is welcome to his opinion. Nevertheless, the Kellogg Pact represents a diplomatic triumph. Some fifty nations have been induced to agree upon a form of words, and for his success in this matter the American author of the treaty has been awarded, and justly awarded, the Peace Prize. It must be noted, in passing, that peace prizes are never awarded to men who actually make peace, like Foch and Pershing, but only to those who invent new forms of peace machinery. The productivity of that machinery is justly regarded as irrelevant.

For a diplomatic triumph the only thing necessary is an agreement upon the form of words. From the humbler standpoint of a lawyer, an agreement is satisfactory only when the words used express the terms upon which the parties actually agree. That the parties to the Kellogg Pact do not agree as to the meaning of its terms is clear. That a dispute as to the meaning of its terms was inevitable from the beginning is equally clear.

The treaty uses two terms, "war," and "pacific means," which are ambiguous. There are those, like Professor Wright, whom we have just heard, who believe that prohibition of aggressive war is intended to prohibit the use of force, but the Secretary General of the League of Nations says that means of coercion, however drastic, which are not intended to create and are not regarded by the state to which they are applied as creating a state of war, do not legally establish the relation of war between the states concerned.

Again, the term "pacific means" is regarded by some as identical with the term "amicable means," but the books on international law distinguish between amicable and pacific means of settlement and recognize various uses of force as pacific, though not as amicable means of settling disputes. Professor Quigley has quoted Professor Oppenheim, and you will find this same distinction in Professor Hyde's work on international law.

If the treaty really imposes no legal obligations whatever on a sovereign, which has been questioned by no less a publicist than Professor A. Lawrence Lowell, its obligations are purely negligible. There is not the slightest ground for imputing any obligation on the part of any sovereign to take any action, either severally or in connection with others, against a party violating a treaty. Why the word "force" was not used instead of "war" and why the term "amicable" was not used instead of "pacific," is a question I shall not ask, because it may involve a state secret embarrassing to our Chairman. I did, however, ask that question of an eminent Senator who was also, and the two are not necessarily identical, an eminent lawyer, as to the view which the Senate took of the meaning of those terms, and he said that he did not think that the United States Senate had considered the question which I raised as to the meaning of those terms.

Professor Wright made a suggestion of very great importance, which was this: that the signers of the Kellogg Pact impliedly, though not expressly agreed to permit the other signers of that pact to take such action as they thought best for the enforcement of that treaty. In other words, that by signing the Kellogg Treaty the United States agreed to allow the League of Nations to take action under Article XVI, cutting off our trade with the offending nation, if the League so decided. That is a very serious and a very dangerous suggestion, and while it is entirely proper, coming from academic sources, I think one will wait a long time before hearing that suggestion made from any official source.

As for the common law of nations, the custom has always been, instead of recognizing the obligation to resist any act of aggression against the sister state, never to interfere for the protection of a sister state against aggression unless there is a definite treaty obligation so to interfere, or unless such interference is important to protect the interests of the interfering state.

As regards the Nine-Power Treaty, most of the obligations of the other signers with regard to China are negative. The positive obligation of the contracting parties other than China are, first, to set sovereign, independent



territory, and administration in the growth of China. This obligation, while nominally positive, is several. The Powers further agree "to provide the fullest and most unembarrassed opportunity to China to develop and maintain for herself an effective and established government," and third, "to use their influence for the purpose of effectually establishing and maintaining the principle of equal opportunity for the commerce and industry of all nations throughout the territory of China."

Whether clause 2 is sufficiently definite to create any legal obligation may be questioned. If it creates any legal obligation, that is a joint obligation of these other parties to China, and the several obligation of each of the other contracting powers to all the others except China. As regards the third clause, the agreement to use influence to maintain the open door may be too vague to create any legal obligation, but whatever legal obligation is created would seem to be of the same legal character as that in clause 2, and, therefore, involving an obligation of the contracting parties, other than China, to each other. A further obligation of the contracting parties to each other is created by Article 7, which provides for full and frank communication between the contracting parties concerned in a situation which, in the opinion of any one of them, involves the application of stipulations of the treaty and renders desirable discussion of such application.

As a defense to the claim that Japan has violated her treaty obligations, Japan relies, so far as the Kellogg-Briand Pact is concerned, upon the construction of the terms "war" and "pacific means" previously placed on those terms by the United States in seizing Vera Cruz, by Italy in bombarding Corfu, by the Secretary General of the League of Nations in defining war; and on China's own failure to treat the fighting in Manchuria and Shanghai as constituting war. The validity of this defense must depend upon the interpretation of an obvious ambiguity in the contract itself. Who is to make an interpretation of that ambiguity which will be accepted as final by all concerned remains to be seen.

As regards the Nine-Power Treaty, Japan presents an interesting if not a novel defense. Her claim is that China is not a nation, and that the obligations of Japan can apply only to a real nation and not to an imaginary nation. The rule of Anglo-American law is that in ordinary cases it is not allowed an individual to escape an obligation by showing the incapacity of the other party to the contract to act as he has assumed to act. Were this rule to apply to international law, Japan would be estopped to deny that China was a nation at the time the Nine-Power Treaty was signed. On the other hand, Japan would not be estopped to claim that while China was a nation in 1922, it had since ceased to be a nation by reason of some subsequent happening. Who is to pass upon this contention of Japan is not obvious, but as China has always been recognized as a nation, not simply by the other contracting parties, but by all members of the League of Nations, it is very difficult to see how, when, and where, Japan is to be able to maintain its



proposition as a matter of law. In the meantime, Japan appears to rest satisfied with calling attention to the maxim that you cannot make an omelet without breaking eggs, at a time when the price of eggs seems to be higher than the price of omelets.

In the absence of any market quotation, the value of peace machinery is a matter of individual opinion; but to scrap any peace machinery unless it is shown to be of no value whatever must seem to anyone an unfortunate waste. It is, therefore, the more regrettable that when the parties to the Nine-Power Treaty provided by resolution of February 4, 1922, that there should be established in China a Board of Reference, to which any question arising in connection with the execution of Articles 3 and 5 of the treaty might be referred for investigation and report, that board of reference should have been scrapped. Should any urge the technical objection that the term "scrapped" is improperly applied to a board which was never organized, he should recall the British battleships which were scrapped under the Washington Treaty by the mere destruction of blueprints. The fact that nothing would have been of more practical value in the present situation than the Board of Reference in China provided by this resolution can hardly be regarded as an adequate explanation of the failure of the Powers to establish such a board.

I have dealt with this subject purely from the legal standpoint, but after the presidential address of last evening, it is impossible to ignore the question of morality. You will recall that Dr. Scott proved conclusively that nations are composed of individuals, and that he urged most eloquently that nations should follow the standards set up by the Man of Nazareth. His address was most eloquent, and he carefully avoided the inevitable anti-climax which would have been necessary had he carried his address to its conclusion. He proved that nations are composed of individuals, and he thereby proved that, until the majority of the individuals in a nation actually follow the standard of the Man of Nazareth, the nation cannot possibly do so.

Mr. HORNBECK (Presiding). At the conclusion of the meeting this morning I had occasion to express the very sincere feeling I had that it had been an exceedingly interesting session, and one of my friends to whom I expressed that view said, "Yes, it was, but the afternoon session will be far more interesting," and I asked him why. "Because," he said, "there will be much more controversy." Whether that makes the matter more interesting or not I suppose depends on individual tastes. Whether his prediction will be fulfilled remains to be seen. At any rate, I now throw the meeting open, and the subjects with regard to which papers have been read are before you for discussion. Whether that need be controversial or not is for you to say.

Mr. GEORGE A. FINCH. Mr. Chairman, I am not the gentleman referred to as predicting the afternoon session would be more interesting be-

cause of more controversy, and I have no desire to engage in controversy on either side of this question, as I have a great regard for both China and Japan. What I would like to see is more discrimination in the consideration of what I consider the fundamental question in the dispute.

It has been rather difficult to cover in the short time we have had, everything we would like to say. It would probably have been better had we stopped after each paper and had a discussion of that particular paper, but, nevertheless, I would like to make a very brief statement of the situation as I see it.

As I tried to intimate in the few introductory remarks that I made last evening, it seems to me that the fundamental question in dispute now, and which has brought about the present situation, has been the question of the validity of the treaties of 1915 between China and Japan, under which Japan is claiming her rights in Manchuria; and, as I said then, I believe the merits of this question go back to the refusal of China to recognize the validity of those treaties, and her claim of their non-validity on the ground of duress.

Now, it seems to me before we get to the point of passing judgment upon what has happened since the dispute arose over that question, we ought to have more consideration as to the merits of the original question,—whether or not a nation can claim and actually try to put into effect its point of view that certain treaties are non-valid or invalid because of duress.

Mr. Dennis this morning in his very interesting paper, in which he treated principally from the point of view of the doctrine of *rebus sic stantibus*, started out with the assertion that he did not think there was any doubt that under present international law a nation could claim that treaties could be abrogated unilaterally on account of duress. Now, if that is so, then I think we have got to give consideration to the other side of the question, as to whether or not if one nation declines to admit that treaties are valid because of duress, the other nation is obliged to acquiesce in that point of view, or if it refuses to acquiesce, whether it has got to arbitrate that question or submit that question to the judgment of third parties.

It was stated, I believe by Professor Wright, that China had agreed to arbitrate all the questions in dispute with Japan, including that of the validity and the interpretation of the treaties of 1915, but is a nation required, and is it usual for a nation which claims it has made valid treaties, to submit the validity of the treaties themselves to arbitration or to judicial settlement, or to the judgment of some third party? If that is not required under present international law, then there is something to the Japanese contention that at least the preliminary question as to whether or not these treaties of 1915 are or are not valid is one between her and China.

Japan in the discussions that have since arisen makes reference also to some duress that was exercised upon her in 1898, when after the war with China, and China as a result of the war ceded southern Manchuria to Japan in perpetuity, but under pressure from France, Germany and Russia, she was

obliged to retrocede that territory to China, and the fleets of those great Powers were concentrated around Japan to give emphasis to their request.

If you once admit the principle of duress as invalidating treaties, then Japan might propose to go back a little further, and bring up some treaties that she might wish to have reconsidered on account of duress.

Professor CHARLES G. FENWICK. How about the prior duress she put on China?

Mr. FINCH. I am not arguing that the principle of duress is a valid principle. I am endeavoring to point out that we are assuming the validity of the principle in the discussion of the present case. Japan denies the principle that duress invalidated her treaties of 1915, and China is asserting it, and what I am trying to bring out is that the disagreement between them over that point is the main question of the dispute now existing over Manchuria. In our desire apparently to emphasize the procedure for maintaining peace, and the existence of these various pacts to set up such a procedure, we are seemingly assuming that a nation is bound to submit to that procedure the fundamental question of the validity of its treaties. I do not recognize that assumption as being an accepted principle of international law or that it is or has been the practice of nations to submit to a foreign tribunal or to other nations the validity of its treaties.

Some reference has been made to the submission of this question to the Permanent Court of International Justice. I do not recall that that court has been given jurisdiction to consider the validity of treaties. Article 36 of the Statute covers the interpretation of treaties, but that is an entirely different matter from the validity of the treaty itself.

Now, when you come to the principle of *rebus sic stantibus*, that has been raised, as I understand it, in connection with the treaties relating to procedure, not to the treaties bearing upon the merits of the controversy between China and Japan. On the question of *rebus sic stantibus*, as here discussed, there is a feature of the situation in the Far East that I think has not been mentioned. Mr. Dennis made a very convincing statement about the maintenance of the *status quo* in China for a number of years, showing that there was no real basis for arguing there had been any important change to justify recourse to the principle of *rebus sic stantibus*. I wish, however, to point out that there has been in recent years a very serious development in China which may have a bearing upon that question, and that is the program of the Nationalist Government in China to regain their equal rights with all the other nations in the world by the abrogation of all so-called "unequal" foreign rights and interests in China. Take, for example, the question of extraterritoriality. China in the last few years has been urging very insistently that the western nations give up their extraterritorial rights in China. At the same conference that the Nine-Power Treaty, which we have been discussing in connection with the doctrine of *rebus sic stantibus*, was adopted, there was also adopted a resolution on extraterritoriality.

Under that resolution the Powers sent a commission to China to investigate and report on the question of extraterritoriality, and an eminent American was the chairman of it. The commission made its report and recommendations, and its recommendation was that extraterritoriality should be given up under condition of certain reforms in China. Now, China in her attempt to get rid of extraterritoriality is ignoring the report and the recommendation of that commission, and while the Nationalist Government has taken no overt act against any of the great Powers, it has declared extraterritoriality abolished several times by resolution. China has also, in some other respects, proceeded against several Powers with the view of forcing them to give up their extraordinary rights in the territory of China.

So that I think, on both of these questions, the question of the validity of the treaties which are in dispute, and also on the question of the change in the situation since the Washington Conference in 1922, there is something to be said from the Japanese point of view. It seems to me that these two questions should be separated and taken up in turn; because if you admit that a nation is not bound to submit the validity of its treaties to arbitration or to any third party, then what application to that question between Japan and China have all these treaties we have now been discussing providing procedure for the peaceful settlement of international disputes?

Professor WRIGHT. May I speak on the point that Mr. Finch made, although I attempted to deal with it, perhaps too briefly, in what I originally said?

I do not have any doubt whatever but that a dispute between two states as to whether or not a treaty is valid is an international dispute and that it is subject to the various agreements which exist in regard to international disputes. It is true that neither China nor Japan are parties at present to the optional clause of the statute of the Permanent Court of International Justice. If either were, I think there would be no question but they would be obliged to submit the question of the validity of the treaty of 1915 to that court. The optional clause expressly provides that the interpretation of a treaty and any question of international law shall be submitted, and if one of the litigants contends that an alleged treaty is really not a treaty at all, that is clearly a question of international law which must be decided before interpretation can begin.

Mr. FINCH. Mr. Chairman, I was careful in my remarks to divide the question into the validity of a treaty and the interpretation of a treaty. I think they are two different things. I do not think the requirement to submit the interpretation of a treaty to a court or third party includes the submission of the validity of a treaty to such outside determination.

Professor WRIGHT. You cannot submit a treaty for interpretation unless you are first sure it is a treaty.

I might say further there are a number of cases where the validity of a treaty has been before the court. In fact, there is one right now in the case

of France and Switzerland, where France is contending that certain clauses of the Treaty of Vienna of 1815 have become obsolete and are no longer valid. That is a question which the court will presumably decide in the next few months.

The question of the validity of a treaty is naturally involved in the question of interpretation and in any case it is a question of international law. However, as I said, neither China nor Japan is under an obligation to submit this to the court because neither is a party to the optional clause at present. Nevertheless it is perfectly clear that Japan is pledged, in case this dispute about the validity of the treaty threatens a rupture, and China has said it threatens a rupture, to submit it to the Council of the League.

There is no qualification as to the types of international dispute which members of the League are obliged to submit to the Council, except that they are likely to lead to a rupture and have not been submitted to arbitration or judicial settlement. Although Japan said there was no danger whatever of a rupture between herself and China, China took a different view of that matter and last winter she succeeded in convincing the League Council of her view of it, and the League Council did assume jurisdiction over this dispute under Article 15, and consequently the whole dispute involving the validity of these various treaties is now before the League Council under Article 15, and as you know there is a commission to investigate it.

But the point I tried to make, and which I think is the essence of the whole question, is that the procedure which the League has worked out, and which is I think involved in the Kellogg Pact, requires that all problems on the merits of a dispute be postponed until active hostilities have ceased. That is the basis on which they are acting.

The League is seized, if you like, of the problem of all the treaties between China and Japan, but it is refraining from making any recommendation on the merits until active hostilities have ceased, and it seems to me that is the policy that is suggested by all the experience of municipal law.

I remember Senator Borah once remarked that he came from the West and it was the practice out there before they allowed litigants to come into the court room to disarm them so that they would not have the fight going on in court. That is the theory of the League's procedure, to get the two litigants separated so that they are not actually engaged in shooting each other, and then the question of the merits, which usually requires the investigation of a great many documents and a long time, can be discussed and a decision eventually reached.

Of course, we have the procedure which was worked out in the Greco-Bulgarian case, and the League Council did exactly that. They first made recommendations and got the armies of the two countries several miles apart. Then they sent up a commission and for about two years they were investigating the merits of the dispute between Greece and Bulgaria. Finally they decided Greece had violated certain treaty obligations and she was required



to pay some compensation. That is the essence of the matter, that you must stop the war, and then you can have all the time you want to settle the dispute.

Mr. FINCH. May I ask Professor Wright a question? Supposing the United States were to join the Permanent Court of International Justice and afterwards Panama should raise a question as to the validity of the treaty under which we operate the Panama Canal. I do not believe that exact question has come up, but there have been some very important questions with Panama as to what that treaty actually does, as to whether it conveys sovereignty, or other important points; but suppose we should get to the point where Panama should contest the validity of the treaty with the United States.

Prof. FENWICK. Did Panama contest it at the time it was signed?

Mr. FINCH. No. Did China contest?

Mr. LIANG. Yes.

Mr. FINCH. But it signed.

Mr. LIANG. Under protest.

Mr. FINCH. I do not see what difference that makes; the validity of a written instrument might be contested on grounds coming to light after signature, as, for instance, fraud or corruption. Professor Wright is arguing that the validity of a treaty must be submitted to arbitration. If the United States joined the Permanent Court of International Justice, would the United States under the provisions of Article 36 which he cites, be required to submit the validity of its treaty with Panama, if Panama should raise that question, or would the United States be justified in saying "The validity of this treaty is not subject to submission to arbitration, or to judicial settlement, or to determination by any other party; it is a matter to be settled solely between the United States and Panama."

Professor WRIGHT. If we were parties to the optional clause we should be obliged to submit it.

Mr. FINCH. I am referring to the jurisdiction of the Permanent Court covering disputes involving the interpretation of treaties. The optional clause provides for the compulsory arbitration of certain disputes, including the interpretation of treaties.

Professor WRIGHT. If you simply ratify the protocol of the court, you are not bound to submit anything to it. The protocol before the Senate at present does not impose any obligation to submit anything to the court.

Mr. FINCH. But would the United States in case it should accept Article 36, be obliged to submit the validity—not the interpretation—of the treaty with Panama to the court (assuming Panama were also a party to that article), or would the United States be justified in saying that that question is a matter between the United States and Panama?

Professor WRIGHT. I think I have expressed my opinion on that. The question of the validity of a treaty is a question of international law to be



decided by whatever international procedure the parties to the dispute have accepted.

**Mr. HORNBECK** (Presiding). A presiding officer is a nuisance, but a necessary one. I think that in order to go forward we will have to limit the debates to rather formal discussion, and the gentleman who is discussing a paper will have to complete his remarks before interruption, unless it be merely a question. We cannot have an informal debate here.

**Professor WRIGHT**. I want simply to make an observation on a portion of Mr. Harriman's statement. I am afraid I did not make myself quite clear in regard to the relations between coercive measures and war. I certainly agree with the Secretary General of the League of Nations in the statement Mr. Harriman quoted, that coercive measures are not always legal war. I also think that coercive measures are not pacific means. In other words, as I pointed out, we have three types of methods for settling international disputes: we have pacific means, arbitration, conciliation, mediation and so forth; then we have coercive measures short of war; and then we have war.

**Mr. THEODORE MARBURG**. I am afraid, Mr. Chairman, we have been overlooking a very important fact; that is, that the League institutions assume dealings between responsible countries, countries which mean to keep their word, and which are able to carry out their promises. Frank J. Goodnow was the legal adviser of the Chinese Government at the time the Empire was done away with. He was consulted and he told them they were unfit for a republican form of government, that they lacked experience and that the experiment would end in disaster. Mr. Dennis has shown you that in all the twenty years that have elapsed since then there has been constant civil war in China.

Is Nanking a government? Is Canton a government? General Ma, you will remember, declared war on Japan. That is exactly as if the Commander of the Department of the East here in the United States should declare war on England. Just before that event he had promised to withdraw his troops a certain distance from the Nonni bridge. The next day he came to the Japanese and said he was unable to carry out his promise because his troops would not obey him. Those two facts show that there is no effective central government at Canton and no sufficient authority in Manchuria.

As to ourselves, what a man does habitually he cannot forbid to the other fellow, unless he is a little fellow that he can bullyrag. I submit that this question cannot be solved unless we establish a rule which will permit joint intervention in backward countries where there is protracted lawlessness.

**Mr. LIANG**. I have no intention to get into a controversy with Mr. Finch or with the preceding speaker, but I do have certain views on questions of international law in regard to the topics in the program, which, by the way, are our legitimate domain of discussion.

There are six ways to kill a cat, and I think there are also six ways for

the international lawyers to deal with the events in the Far East. By these events I mean to indicate the Japanese activities in Manchuria and in Shanghai and China's resistance thereto. Certain people shut their eyes to realities, and think that the League of Nations Covenant and the Kellogg Pact do not exist. One faction of them say that there was no war in China, and another faction, that there was war in China, without reference to any of the relevant and governing legal instruments, namely, the Kellogg Pact and the League Covenant, wherein the word "war" is used. And there are also those who think that both within the meaning of the Kellogg Pact and the League Covenant there was war, and there are also those who think that within the meaning of the League of Nations Covenant and the Kellogg Pact there was no war. Also those who think that the Japanese activities violated the League of Nations Covenant, but not the Kellogg Pact. Also those who think the Japanese activities violated the Kellogg Pact but not the League Covenant. Also those who think the Japanese activities do not violate any of these instruments. So, we have a morass of opinion among international lawyers, and for all these positions I can quote authors, if you want me to.

I think the time has arrived for us to adopt a new technique, a new method in regard to attacking problems of international law, and the method I would adopt in dealing with this problem is not only that we should adopt mechanistic jurisprudence, but also psychological and sociological jurisprudence. We start with this question: When are states in a state of war? Lawyers will say war must be declared, because the third convention of The Hague Conference of 1907 does provide that hostilities must not commence before a declaration of war or a conditional ultimatum. In reply to this argument, I would say that this provision is one of a regulatory nature not of a constitutive nature. By this I mean it regulates the mode for the commencement of hostilities. But the failure to comply with that convention does not prevent a legal status of war from coming into existence.

Now, we have also the other rule that the parties must have *animus belligerendi*, i.e., the intention to create a state of war instead of the mere engaging in actual hostilities. Who is going to determine this *animus belligerendi*. You have to avail yourself of methods of psychological jurisprudence. Psychologically, there are reasons for both China and Japan not to declare war. The stronger state is afraid to declare war for fear of being branded as the aggressor. The weaker state is afraid to declare war, because in addition to the risk of being branded as the aggressor, it will face extermination at the hands of the machinery of modern warfare which can be let loose by the open declaration of hostilities. This accounts for the absence of a declaration of war by either of these two parties.

Now, we look at the Covenant of the League of Nations and the Kellogg Pact. Both these instruments impose a duty on the signatories. I would adopt the method of sociological jurisprudence, which calls for a different approach to this problem. One situation may be in a state of war and

another may not be. Legal situations do not exist *in abstracto* or *in vacuo*. If we see the League Covenant and the Kellogg Pact as social means of controlling international affairs, the only conclusion we can reach is that the Covenant of the League of Nations and the Kellogg Pact necessitate an interpretation that the events in the Far East do constitute war within the meaning of those documents.

This is what I would call the sociological interpretation of those two instruments, if one does not regard those two instruments as mere scraps of paper. Unless this view is taken, then both the League Covenant and the Kellogg Pact would accomplish only one thing, that is, they would prevent or even abolish henceforth the actual consummation of a state of war as now defined by the casuists. Viewed in this light, both the League Covenant and the Kellogg Pact would not be anything more than one of the rules in the laws of war intended to mitigate the horrors of war, because the actual fact of war will still exist, *minus* the declaration, and the aggressor state can get all the advantages without a formal declaration, and does not have to obey the *temperamenta* of The Hague conventions regulating the conduct of war.

MR. EDGAR TURLINGTON. I would like to make one brief remark, to clarify my own mind, I might say, through the discussion that may follow. I notice what seems to be a slight confusion of the two questions discussed this morning, the question of duress and the question of *rebus sic stantibus*. The statement was made a few moments ago that a certain treaty was said to have been made under duress and therefore to have become obsolete. It seems to me that that statement telescopes in a rather confusing manner the two questions that were discussed. If the treaty was made under duress, it may have been valid or may not. It may or may not be valid now. The question whether it was originally valid may be different from whether it is now valid.

I would suggest that if the Council of the League of Nations becomes sufficiently interested in the question whether the treaties concluded with China in 1915 were valid at that time, it might properly ask the World Court for an opinion on that question, simply an advisory opinion. It seems possible also that the Council might ask the World Court to give an advisory opinion on the question whether conditions have so changed since these treaties were signed that they are no longer in force, if they were in force originally. It seems to me the Council might also ask the World Court for an opinion as to whether the Nine-Power Pact has in any way been modified in its incidence upon the parties since it was originally concluded. I would suggest further that I see no particular reason why the World Court might not some time be authorized—I am not sure it does not already possess authority—to consider as a legal question whether a given treaty is valid. I raise the question, and I hope that somebody may take it up and throw further light upon it.

Professor CLYDE EAGLETON. I would like to say a word in a more

general approach to this whole problem. It seems to me that there are two matters that underlie the problems that we have been discussing, one of the most difficult problems that we have. The first one of these is the right that each state has to decide for itself in all matters. As to treaties made under duress, while imposed on the state, the state may claim, by its own judgment, to escape through the doctrine *rebus sic stantibus*. Each state decides for itself whether or not it has an obligation, whether the *rebus* still are *sic stantibus*, or if it is self-help or self-defense.

All these steps we are discussing go back to that same question. As long as you admit that a state has the right to make its own decisions in all these matters, then you are not going to get anywhere. That is especially true when you are talking about self-help; and war is a form of self-help. As long as you admit war, or any other form of self-help, superior force, then I do not see how you are going to solve any of these problems. But there seems to be general agreement now that there should be a collective judgment substituted for the individual judgment of states, and we are making progress in that direction.

And now we come up against the other problem, which to me is the most difficult immediate problem that we have. You can say, "We will outlaw war," and by so doing you help solve all these problems we are talking about, but then you get up against the problem for which I have found no answer yet, What is war? And it seems to me that the society of nations is confronted now with a choice of two alternatives, or alternative statements of the rule. Either you may say, all use of force is outlawed, or, rather, the use of force is forbidden to any individual state, and remains the monopoly of an organized community of nations to be used as a sanction; or you can say in the terms we have been talking hitherto, "We will outlaw war." If you outlaw war, then you have got to define war, and you have got to define it, on the one hand, so that you will include such a situation of self-help as now exists between China and Japan, which is said not to be war, and which I think is not war, technically. Nevertheless, you want to include such situations in your outlawry of war. On the other hand, you have got to state your definition of war so that it will not forbid the use of sanctions, the use of force as sanctioned by the organized community of nations. That, it seems to me, is the most immediate problem which the society of nations has to face.

I do not see how the League of Nations can proceed with its work, I mean in this field of settling disputes, nor do I see how the Kellogg Pact, so-called, can be made effective, until you have answered the question of what is war, and I would much prefer the first statement I gave. I would rather have the rule stated that there shall be no use of force permitted to any individual state, and thus eliminate the use of "war" with all its connotations. If you use the word "war" you still have a great deal of confusion. That term was brought to my attention by the situation be-

tween Japan and China today, which under our present law, seems to me to be insoluble.

Mr. GEORGE GRAFTON WILSON. Mr. Chairman, while I did not intend to say anything about this subject, it seems to me now perfectly well established when there is war. The object in establishing the third Hague convention in 1907 was to make that status, the war status, perfectly definite. The leading states of the world agreed not to resort to war without a previous declaration and so forth. To propose just one example let us take the Kellogg-Briand Pact; this Pact renounces war as an instrument of national policy. Just how would this have struck the Senate Committee on Foreign Relations if it had read that the United States agreed not to resort to the use of force as an instrument of national policy, and how many votes would probably have been given for it in the United States. It is perfectly clear from the correspondence and discussions that the United States Senate was talking about war as defined in the convention of 1907 to which the United States is a party and was not talking about any vague concept which may be placed under the category of the use of force. As to the outlawry of war, war is regarded as a status, and if any lawyer can tell me how you can outlaw a status, I would be very much interested in following his reasoning.

Mr. LIANG. I dislike taking issue with Professor Wilson, but I still insist on my opinion that the violation of that provision in The Hague convention only subjects the violator to penalties which are usually attached to one who violates a treaty, and to argue the other way would be to put a premium on a non-declaration of war while pursuing armed hostilities, the very thing the convention seeks to prevent.

Professor WILSON. I want merely to reply that ordinarily in time of war governments do not maintain diplomatic relations, and in time of war the other governments usually become neutral, which is not the case at the present time.

Mr. LIANG. Much confused thinking has been shown in regard to the requisites of a war and the incidents of war. The severance of diplomatic relations, the passing of an embargo act, the enactment of a trading with the enemy act, and even a declaration of war, are the incidents or usual consequences of war, while the status of war can exist where these incidents are absent. I can find no authority, except some text-writers, including Professor Wilson himself, that say categorically war must be declared.

Professor QUINCY WRIGHT. Mr. Chairman, I have discussed the question at some length of when war exists in the current number of the *American Journal of International Law*. I will not go into that at length. I will have to confess that I think there is some basis for Mr. Liang's insistence that the third Hague convention of 1907 may be construed as being merely, as he called it, regulative, and not prohibitive.

Mr. LIANG. Constitutive.

Professor WRIGHT. Constitutive. It states that the parties "rec-



ognize that hostilities between them must not commence without" a formal declaration or ultimatum. I think the French text is "*ne doivent pas commencer.*" I think that would probably be held to create a *duty* not to go to war, but it does not necessarily deprive them of the *power* to start a state of war by some other means. If they did start it by some other means, they would have violated the convention and doubtless would be responsible for that, but they might nevertheless have exercised a power which produces legal results. I am not entirely certain of this, but I am inclined to think the convention should be interpreted that way.

Nevertheless, I am equally convinced that no war has existed between China and Japan. I think that some state must have recognized a status of war as existing before a state of war exists. Neither China nor Japan has declared war, nor have they recognized war as existing, and no third state nor the League of Nations has recognized a state of war as existing. I think legally it is perfectly precise, when a state of war exists. There must be adequate evidence of intention on the part of some state to make war or recognition by some state that war exists. I have not found any evidence that there is any such thing on this occasion.

Mr. LIANG. I agree with Professor Wright on general lines, but I think if we view the League Covenant and the Kellogg Pact as instruments for the control of armed hostilities, then while war may not exist in abstract, it must be construed as existing within the meaning of those two documents, if they are going to have any meaning at all.

Professor EDWIN M. BORCHARD. The school of international law to which I belong regards it as rather difficult for a government to attack several millions of people in and around Shanghai, kill many thousands, seek to impose its will on the government, drive its administration out of Manchuria, and say that it is being done peacefully, or quasi-peacefully, or as a local reprisal. I observe that the hostilities were concluded by an armistice. The attempt to impose your will on other peoples by force of arms, driving them out of their territory and killing immense numbers in the process, has I think only one name in international law, and that name is war, whether you declare it or do not declare it.

Of course, most wars are not declared. Perhaps we will be able to test the issue, aside from the fact that the League Commission did say that a "state of open war" exists, when the claims begin coming in for injuries to nationals and foreigners. A great many foreigners were injured in those hostilities. Now, if there was not a state of war, then I take it Japan or China might be held liable for the damages that were sustained by foreigners. I have a strong suspicion that Japan will not be held liable by a court of law for the damage which her guns inflicted, and infer that the reason will be because the commission or court will say these are war damages, and I should suppose that the commission or court would be correct if they came to that conclusion. Probably China will equally escape liability.



I find it very difficult to agree with my friend, Professor Wright, in his theoretical classifications.

Mr. HORNBECK (Presiding). I take it there is no one else who wishes to speak or to ask a question. I have no desire or intention to enter into the discussion. I have found it very interesting and, as usual, find these discussions illuminating in several respects.

All I wish to say at this moment is that, so far as I have heard today, there has been no discussion of the relationship of bilateral and multilateral treaties, or of their comparative importance, from the point of view of the question: which, if either, if there is conflict, should or might take precedence over the other. I have also heard no discussion of the time factor as regards the question of precedence. I do not intend to discuss those questions, but I suggest them. Those items are of considerable importance in any study that we may make at the present time of the treaty situation "in," as the program says, "the Far East"; I would have it read "In and with regard to the Far East."

I now declare this meeting adjourned.

(Whereupon, at 5 o'clock p. m., the Society adjourned, to reconvene at 8 o'clock p. m.)

#### FOURTH SESSION

Friday, April 29, 1932, 8 o'clock p. m.

The Society reconvened at 8 o'clock p. m., JAMES BROWN SCOTT, President, presiding.

The PRESIDENT. The meeting will come to order. The topic of the evening will be a discussion of international loans and international law, and the first speaker on this very important subject will be Mr. Edwin M. Borchard, Professor of Law, Yale University School of Law.

Professor BORCHARD. Mr. President, ladies and gentlemen: I have a long paper, and even longer foot-notes, but I am not going to perpetrate it all upon you. I shall try to stay moderately within the time-limits that are laid. I shall therefore just go over some of the more technical points and move for leave to print.

#### INTERNATIONAL LOANS AND INTERNATIONAL LAW

By EDWIN M. BORCHARD

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The term "international loans" will be used in this paper in its somewhat inaccurate though customary sense to describe the transaction by which a private lender in one country exchanges his money, his present command over goods and services, for the promise to repay with interest at some future time, made by a foreign government or state.<sup>1</sup> This extraordinary phenomenon necessarily presupposes a highly integrated world and an advanced state of civilization, for the promise runs often for generations and, in all essential respects, depends for its fulfillment upon the good faith of the debtor. Into the creation and performance of this promise enter a variety of economic and legal considerations. It should be the function of the law to surround this long-term transaction with safeguards designed to clarify the nature of the promise; to ensure, so far as possible, its orderly performance; and to relieve the legal relations created from the dangers and uncertainty to which they are exposed by political vicissitudes and economic insolvency. For the international loan performs an essential economic and social service in a world in which foreign trade and the development of backward and other areas plays so large a part. When, as has been the case, it is employed by the governments of the lenders to perform a political

<sup>1</sup> The term "international loan" would be more accurately applied to loans made by one nation to another nation. The term is not generally applied to the purchase of an internal bond of a foreign country by a national bondholder or to investments abroad in the form of stock purchase or purchase of foreign property, real or personal. Nor will it here be used to describe loans by nationals to foreign private enterprises, corporate or individual. The loan is usually evidenced by a bond or other certificate constituting a promise to pay, with interest.

function, thus becoming an instrument of national policy, the student of political science joins the economist and the lawyer as an interested observer.

The law touches the transaction at various points and seeks by a variety of rules and devices to prevent a default and, should default occur, to restore, so far as possible, the crumbling structure and the disappointed hope. The lawyer must endeavor to safeguard the lender, without doing injustice to the borrower, against contingencies, both in peace and in war, and bonds and indentures, like insurance policies, have come to embody the fruits of experience. As a rule, the lender will be one of many classes of creditors of the state, and, especially if the debtor has an impaired debt record, the lawyer must seek by security devices to protect his client against loss and discrimination in the event of impaired capacity to pay. In any eventual insolvency, his intervention becomes especially important. International relations are affected by the transaction because its very size usually exercises an influence upon economic and political relations extending across national boundaries. International law enters the transaction mainly through the fact that a breach of the obligation occasionally induces the Foreign Office, especially in the event of repudiation, to take an interest in the problem and, depending upon the circumstances, to lend diplomatic support to its solution. Bondholders, also, in the course of time, have formed protective associations to deal in common accord with defaulting states. It is not always easy to distinguish municipal from international law in their impingement upon the transaction, or to determine what can be deemed a custom and when custom has become law. But as in all empirical sciences, the science of human behavior in the conclusion and, when necessary, the readjustment and reorganization of foreign loans is best established inductively by observation.

#### I. HISTORICAL DEVELOPMENT

The bond of a government in the hands of foreign private investors is a comparatively modern phenomenon. In the Middle Ages loans to the state were made by particular individuals as personal loans to the sovereign. These sovereigns often gave mortgages on their lands or pledged personalty to the lender. Since the 16th century, when the territorial State reached full development, with a treasury independent of that of the sovereign, the personal credit of the king was substituted by the credit of the state.

The form of loans also changed. Instead of accepting a loan from one or several individuals or bankers, public subscriptions were opened. Occasionally the so-called private property of the state, not devoted to the public service, was mortgaged or burdened. But bankers did not disappear. Whenever the chances of the success of a loan by public subscription seemed weak, resort was had to bankers, either as direct lenders or as underwriters. Colbert in France borrowed considerable sums from a Dutch banker in 1662, and Terray, in 1771.

There were, of course, other means of raising money besides public loans. Apart from taxes, fiat money, the anticipation of receipts, the farming out and mortgaging of revenues and taxes, have all been well-known since the 17th century.

In the 18th and early 19th centuries, loans were raised mostly in the home market, though there were some foreign loans. Foreign loans in the 19th century were contracted principally by economically weak states whose home market was unable to supply the necessary funds. Defaults were not uncommon. This phenomenon produced demands for security; and security plays a most important part in determining the position of creditors. Numerous states, such as Colombia, Greece, Santo Domingo, and some of the Central American countries, have been in default several times.

Statisticians have reported that state debts have grown in the course of 130 years from about \$2,500,000,000 in 1789 to \$7,500,000,000 in 1815, \$20,000,000,000 in 1889, \$31,000,000,000 in 1914, and \$210,000,000,000 in 1919.<sup>2</sup>

The fact that foreign loans play so important a part in the economic and even political life of many countries, and the sad experience of investors in the loans of numerous borrowing countries,<sup>3</sup> have almost inevitably created a more or less close relationship between the financier and the government in supervising, if not controlling, the loan. The relation has in it elements of danger and elements of helpfulness. The danger is demonstrated in the recitals in Dr. Feis' valuable book<sup>4</sup> indicating that in the late 19th and the 20th centuries foreign loans became for several countries the instruments of diplomacy and bitter rivalry, dragging behind them in their ultimate operation millions of innocent people. The helpfulness is evidenced in the fact that governmental supervision of so important an economic export as capital may protect national investors and the country itself against impecunious and improvident loans. But to what extent the interference shall take place is a question not easy to answer, and the experience already accumulated indicates that its answer differs in different countries. The relation between government and commerce is a changing relationship and depends upon

<sup>2</sup> Manes, *Staatsbankrotte*, 2d ed., 14.

<sup>3</sup> The principal non-American cases of state insolvency have been: Austria—1802, 1805, 1811, 1816, 1868, 1919; Holland—1814; Germany (Prussia)—1807, 1813, 1919; Westphalia—1812; Schleswig-Holstein—1850; Spain—1820, 1831, 1834, 1851, 1867, 1872, 1882; Greece—1826, 1893; Portugal—1837, 1852, 1892; Russia—1839, 1919; Turkey—1875, 1876, 1881; Egypt—1876. In the United States, nine states of the Union—Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and West Virginia—repudiated their debts about the middle of the century; and in South America and Central America, almost every country at one time or another has been unable or unwilling to pay as promised its bonded indebtedness. The defaults of 1930, 1931, and 1932 open a new chapter.

<sup>4</sup> Europe, *The World's Banker, 1870-1914*. An account of European foreign investment and the connection of world finance with diplomacy before the war. (New Haven, 1930, Part 2.)

many factors, of which war, past and prospective, is not the least important. Intense political rivalry among the nations is likely to make the relationship close. The unprecedented political and economic positions consequent upon the late war induced the United States Government to follow the European example in asking bankers to submit prospective foreign loans for the approval of the Department of State, to determine whether the loan conflicts with the public interest, as construed by the executive. What is deemed the public interest varies from country to country. It is interesting to compare the policy pursued by the French Government in approving or disapproving loans, as brought out by Dr. Feis, with the policy of the United States Government, since March, 1922.

In the United States the purpose of the control has been to prevent loans to countries which were reluctant to make debt settlements with the United States Government, or loans to build up armaments, to promote revolution abroad, or violate national policies (such as the "open door" in China), loans for government-sanctioned foreign monopolies (such as coffee and potash), and, it is said, loans to manufacturers competing for Russian business.<sup>5</sup> Some of these objectives may seem questionable or hardly practical. The Department of State has disclaimed any intention of passing on the merits of loans as business propositions, and appears moderately to have adhered thereto, and yet perhaps that is the factor which most deserves examination, if not by the government, then, in the light of experience, by some other qualified committee. The bondholders or issuing bankers in England, France, Germany, Holland, and Belgium formed advisory and protective bodies which, by their relations to the government, the banks, and stock exchanges, were enabled to check the flotation of loans on behalf of governments which had indicated a record of bad faith. Whether any public or private authority in the United States would in the years 1925-1929 have shown in general less optimism than the issuing bankers, is an open question. Capital export, however, is so vital a part of the national economy that whatever body or bodies undertake to control or direct it—governmental, private, or both—must take into account not only political considerations, but economic considerations as well, and in this connection, without any governmental guaranty of risks, must call attention to the economic factors which militate against the desirability of a loan as a business proposition. Even if conceded to be a business transaction, however, it is one so peculiarly affected by political and social considerations that the representation on the supervising body or bodies must be large, and should include the legislative as well as the executive branches of the government. Probably two bodies would be preferable—one to take into consideration the governmental and public policies involved, the other, the private or business prob-

<sup>5</sup> John Foster Dulles, "Our foreign loan policy" (1926), 5 *Foreign Affairs*, 33; Dr. Leo Gross, "*Bundesstaatliche Kapitalkontrolle in den Vereinigten Staaten von Amerika*," *Mitteilungen des Verbandes österreichischer Banken und Bankiers*, XIV, pp. 17-25, 89-103 (1932).

lems, both to be augmented by qualified experts. On the other hand, it is not suggested that the responsibility of issuing bankers shall be relieved, mitigated or shifted. An exhaustive study is warranted as to how far the control of American foreign loans can most effectively be accomplished in the general interests of the American people.<sup>6</sup>

But it is in the event of default on an international loan that the law enters upon the stage in full panoply. Insolvency, which has made its way as an amelioration of the rigors of capitalistic contract and reflects the development of humanitarian tolerance, creates problems not only of an economic kind for the coöperation of bondholders among themselves and with the defaulting government, but also of a legal character, having immediate and prospective importance. It is in the precedents that in the main a legal structure can be inductively erected. The vicissitudes of political life, great enough in the past and resulting in manifold insolvencies, are now aggravated by the unfortunate political settlements in Europe, which materially interfere with the economic laws of nature. The resulting uncertainties and insecurity of life, individual and national, have made, and probably will continue to make, defaults on a large scale almost inevitable; and unless some measure of economic security can be reestablished in the world during the next decade or two, international loans may well become a matter of mere historical interest. But at the moment billions of foreign loans are still outstanding, and it is a matter of vital importance to thousands of bondholders to protect the institution from destruction.

Here the government enters upon the stage more cautiously, whereas bondholders, through their protective agencies, are accorded a wide, if not unhampered, scope in the adjustment of their claims among themselves and with the defaulting debtor. It has been commonly assumed that these arrangements are the haphazard result of fortuitous bargaining skill, without regard to precedent or principle; but an examination of some fifteen of such settlements and an observation of the bases upon which they were effected lead to an inference of somewhat greater system. The claims to priority of the different classes of creditors and the premises upon which priorities are based, lead to results more rational than the hypothesis of chance would sustain. And in the light of experience possibly we may hazard a prognosis of the legal effect of security clauses and the rank of different types of claims, as well as of the extent to which governmental intervention can be legitimately predicated. Before venturing upon this essay, however, some discussion of elementary considerations in the problem is justified.

## II. PRIVATE AND PUBLIC INSOLVENCY

It is obvious that state insolvency or bankruptcy differs materially from the private-law insolvency or bankruptcy from which it has taken its name. The private-law insolvency is established by definitely determined

<sup>6</sup> See speech of Senator Johnson of California, 75 Cong. Rec. 6219 (1932).



facts, and results either in a composition with creditors or in a judicial proceeding resulting in a decree which authorizes the creditors to liquidate the assets of the bankrupt and pay the debts so far as possible. In state insolvency or bankruptcy, there is no judicial proceeding resulting in a decree. There is no sale of the assets of the insolvent state. Indeed, the state must go on; and, in the absence of political intervention, the state usually effects a composition with its creditors. In private law, bankruptcy may constitute a penal offense subjecting the bankrupt to the jurisdiction of the criminal courts. In the case of a state, the inability or unwillingness to pay has no criminal connotations, in spite of the fact that the insolvency may have been the result of the grossest mismanagement. In the case of a private concern, the reason for insolvency is almost exclusively inability to pay. In the case of a state, the non-payment may result from either inability or unwillingness to pay. In the case of an insolvent individual who goes into bankruptcy, all his property, with trifling exceptions, becomes subject to attachment and sale for the benefit of creditors; in the case of a private corporation, all the property may be sold. The state is subject to no judicial forum, cannot be compelled to pay except through the need for credit or through diplomatic political pressure, and its assets are not at the disposal of its unpaid creditors. For economic, political, or moral reasons, a defaulting state usually endeavors to effect a composition with its creditors, in order that its credit and reputation may not too greatly suffer.<sup>7</sup>

### III. CONCEPTION OF STATE BANKRUPTCY

It has been denied that a state can become insolvent or bankrupt, on the argument that a state has an unlimited taxing power and, therefore, can always pay its debts. As a matter of practice and economics, the innumerable cases in which states have gone into default and in which creditors have had to effect or consent to a reorganization and take considerable losses is a sufficient answer to this view. Such losses have been taken in cases where the creditors themselves had full opportunity to administer the insolvent country through private, quasi-public or public commissions, as in the cases of Egypt, Turkey, Greece, Nicaragua, Santo Domingo, Haiti, and others. There is a limit to the taxing power, particularly in weak countries, which almost exclusively have been the subject of receiverships. And the term "insolvency" or "bankruptcy," whether accurate or not, is the term which has come into vogue by general usage.<sup>8</sup>

<sup>7</sup> Wuarin, *Essai sur les emprunts d'états* (Paris, 1907), 60; Meili, *Staatsbankrott*, 11 et seq.; Manes, *Staatsbankrotte* (Berlin, 1919), 2d ed., 17-23.

<sup>8</sup> Lehr, for example, in *Handwörterbuch der Staatswissenschaften*, Vol. 5, p. 832, 1st ed., says: "When a government, with or without express declaration, openly or tacitly fails to fulfill its obligations toward its creditors, we speak of a state bankruptcy." Pflug, in his work *Staatsbankrott und internationales Recht* (München, 1898), 1, says: "State bankruptcy is the refusal of a state to pay its legally undoubted money obligations toward private persons, whether this be caused by inability or unwillingness, or both." Wuarin, *op. cit.*, p. 62, says:

## IV. TYPES OF STATE INSOLVENCY

The types of state insolvency have been classified as follows:

1. Non-payment of interest, by reducing the rate,<sup>9</sup> by postponing the payment for a period,<sup>10</sup> by complete and indefinite suspension of interest payments,<sup>11</sup> by reduction of the coupon interest by a special tax on the coupons in breach of the contract.<sup>12</sup>

2. By a failure to repay the capital, either by postponing the duty to repay,<sup>13</sup> by transforming the obligation into a different type, including com-

"The bankruptcy of a state, from a legal point of view, consists in the official declaration, by law or decree, of the non-performance by the state of its obligations of its public debt, whether the violation of the rights of its creditors proceed from the insolvency of the state or from its unwillingness to pay." Von Heckel, in his *Lehrbuch der Finanzwissenschaft* (Leipzig, 1911), 450, says: "State bankruptcy is present whenever a state violates the rights of its creditors, with or without express declaration, by failing in whole or in part to perform its obligations as a debtor."

<sup>9</sup> This occurred in the case of Greece after 1873, which for many years paid only 30% of its coupon interest; and Portugal, which after 1841 reduced its interest payments from 4% to 2½% for a number of years.

The South American countries are prolific in instances of this type. Under this heading might be included the failure to pay interest in cash, but in paper money or other promises to pay—a typical example of which is the Turkish default of 1875, after which Turkey for five years resolved to pay one-half its interest in cash and to give 5% notes for the other half. Even this undertaking was not carried out, for in 1876 a complete insolvency took place and coupons were no longer paid.

<sup>10</sup> This has not been an uncommon practice, for war and revolution have placed many states in temporary default, requiring postponement in payments.

<sup>11</sup> An example of this form of default will be found in the Spanish insolvencies of 1820, 1834, 1851, and 1867. These defaults were made good only in part, when refunding or reorganization or consolidation of loans, helped by a new loan, was undertaken. In 1834, for example, Spain declared that one-third of its foreign debt would be considered as not subject to payment of interest, whereas the other two-thirds were to be subjected to compulsory conversion into new 5% bonds. Even on these, interest was defaulted. Greece, after 1827, completely defaulted on interest for nearly 50 years. Argentina paid interest on its first loan from 1825 to 1829, but then remained in default of interest from 1829 to 1857. In 1890 an agreement with the Bank of England provided for a partial payment of the defaulted interest. Mexico, which effected its first loan in 1825 in Europe, suspended payment of interest in 1827, resumed in 1836, suspended in 1846, resumed in 1850, suspended from 1859 to 1863, and in 1886 entered into an agreement with its creditors to pay, after 1889, 3% interest. San Salvador suspended interest from 1828 to 1859; Guatemala from 1828 to 1855; Ecuador from 1834 to 1854 and from 1868 to 1899. The suspension of interest might best perhaps be called a form of moratorium, rather than insolvency, if the state subsequently makes good its default. Such resumption is somewhat rare.

<sup>12</sup> Obviously, not every tax on coupons can be regarded as the result of insolvency. Where the coupon, however, is tax exempt by contract, such tax constitutes a violation of the obligation to pay interest. Examples of this type of unlawful reduction of coupon interest are to be found in Austria in 1868, in the Spanish 4% loan of 1882, in Russia in 1885, in Italy in 1894, and other instances.

<sup>13</sup> Such a default may occur in the failure to redeem at the time promised, the failure to draw a lottery loan at the time promised, or the failure to pay annuities. In this category, one often cites the case in 1770 of Louis XV, whose Finance Minister Terray diverted to other

pulsory conversion,<sup>14</sup> by reducing the capital amount of the debt,<sup>15</sup> by conversion of a metal into a paper obligation.<sup>16</sup>

3. By a reduction or repudiation of interest payments and the simultaneous reduction or repudiation of the capital debt.<sup>17</sup>

uses for eight years funds set aside for the payment of debts. South American countries, and states in federal governments like Argentina and Brazil, have frequently suspended the payment of capital sums or failed to carry out the amortization covenants of loan contracts.

<sup>14</sup> The compulsory character of the obligation is sometimes difficult to prove, though it may well be assumed that no creditor willingly submits to a diminution of his claim. Older forms of loan contracts frequently contained a clause that a conversion was not to take place for a given number of years. Nevertheless, the practice was so common that certain writers on finance seem to have regarded a conversion as something inevitable. If creditors are given an option to take the new converted debt or payment of their old debt, there is nothing objectionable in the transaction.

One form of conversion has been the compulsory exchange of a short-term or floating debt for a permanent consol uncalled. Philip II of Spain, in 1557, converted a debt of 7,000,000 ducats into permanent consols, cancelling the security on the debt and reducing the interest at the same time.

A more modern example was the conversion in 1880 of the 7% and 9% Egyptian debt into a 4% to 5% debt, at the time of the institution of financial control. In Serbia a 5% consol was converted into one of 4%. It has been argued that the subsequent acquiescence of the creditors makes these conversions contractual and hence unobjectionable. This seems an evasion, because the creditors, doubtless, in the absence of any other remedy, must perforce accept their lot.

Some authorities justify compulsory conversions, when not too seriously violative of the terms of the original contract, on the ground that new conditions, such as political, financial or social upheavals, make it necessary to effect some new arrangement with creditors for the benefit of the taxpayers. These equitable considerations, they maintain, require creditors to forego a portion of their claims in the general interest. This, however, seems a dangerous argument and would seek to introduce into the debtor-creditor relationship something like the clause *rebus sic stantibus* in international treaties, which assumes that treaty promises are entered upon on the assumption of the continuance of a certain condition of affairs.

<sup>15</sup> A well-known illustration is the reduction of the French debt in 1797 by the National Assembly. After the payment of interest had been reduced to three-fourths, for which the creditors received assignments on national assets, the principal of the debt was in 1797 reduced by the Directorate to one-third of its amount. For the other two-thirds, the creditors received coupons which would be accepted for payment, if they purchased state property. These coupons sank in value to one-sixth. Holland and the Kingdom of Westphalia followed the French example. Foreign writers occasionally cite the case of Minnesota, which, in 1858, reduced \$100,000,000 of railroad bonds to \$50,000,000.

<sup>16</sup> This type of bankruptcy was known even in ancient Rome. Since the war, the payment in an inflated paper currency of an obligation contracted in a metal and sound currency has been common throughout many of the ex-belligerent countries. It is a form of confiscation and admission of insolvency. Similar transactions happened in Portugal in 1899 and in Greece in 1893. The Portuguese creditors lost two-thirds, and those of Greece, 70%, of their interest. Russia entered on such a transaction in 1839, though in Russia it affected practically only Russian creditors. This Russian affair has been characterized by writers as an intentionally fraudulent transaction, for they took silver away from the people and gave them worthless paper in its place.

<sup>17</sup> Both types of reduction have been known in connection with a single debt. This was done in Austria in 1811, where the interest was cut in half and the capital converted into a

There are other methods of manifesting insolvency, such as the demonetization of the contractual standard of value or currency, directly or indirectly, by fiat or inflation. And the inability to supply foreign exchange for transfer, raises problems of special interest.

Repudiation, the publicly-declared refusal to pay, differs from mere default, usually an involuntary, and not publicly-declared, failure to pay. International law distinguishes sharply between the legal consequences attaching to each, for only repudiation or wilful breach is regarded as violative of international law.<sup>18</sup>

#### V. LEGAL NATURE OF THE LOAN CONTRACT AND ITS BREACH

Owing to the peculiar character of one of the contracting parties, the so-called sovereign state, a variety of views exists concerning the legal nature of the obligation held by the creditor.

1. Those who regard the sovereign as above the law—a view having a long historical background<sup>19</sup>—come to the conclusion that the sovereign cannot be subjected to legal rules; that he who contracts with him or the state has nothing but the state's honor and credit as a sanction, because the state cannot be sued, either in its own courts or the courts of the bondholder; that the contract is, therefore, aleatory or a gambling contract, depending for its performance entirely on the good faith and willingness of the debtor. This school of jurists concludes that, if the state becomes insolvent or repudiates, such eventuality is a contingency which the creditor had or should have had in mind in concluding the contract or buying the bond, and that the state is as privileged to alter the terms of the contract or to violate it, as it was originally to enter upon it. For this school, the rela-

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different currency. It was also done in Egypt, Turkey, Greece, and Santo Domingo. South America offers other illustrations.

<sup>18</sup> These repudiations have often followed revolutions, when the new government repudiates obligations contracted by a previous *de jure* or *de facto* government, on the allegation that the prior government had no authority to bind the nation. Philip II of Spain is cited as having openly repudiated in 1566, 1576, and 1595. Portugal declined to be bound by the debt contracted by Dom Miguel, 1832. Mexico declined to be bound by the debts contracted by Maximilian. Mississippi, Florida, Alabama, North Carolina, South Carolina, Georgia, Louisiana, Arkansas, and Tennessee repudiated their debts around the middle of the 19th century, but in some of these cases the allegation was made that the loan was not contracted according to law, including lack of legal authority of the officials purporting to represent the state. Where in fact the loan contract is defective in law, either because there was no constitutional or legislative authority to contract the debt or because in other respects the rules of law governing a binding obligation were not observed, the repudiation may have a legal justification, and the creditor may not be deprived of any legal right, for in such cases his obligation from the beginning was not legally binding. We cannot here enter into the power of *de facto* governments to bind the state, although, in principle, it may be said that general *de facto* governments having actual control of a country are in international law its legal representatives and have authority to bind the nation.

<sup>19</sup> Borchard, "The Relation Between State and Law" (1927), 36 Yale Law Journal, 780.

tions between the parties escape not only judicial control, but legal character.<sup>20</sup>

<sup>20</sup> The jurist Hugo, often called the father of the historical school of jurists (*Lehrbuch des Naturrechts*, Berlin, 1819, 2d ed.), says: "A national bankruptcy is by no means illegal, and whether it is immoral or unwise depends altogether upon circumstances. One can hardly ask of the present generation that it alone shall suffer for the folly and waste of its predecessors, for otherwise in the end a country could hardly be inhabited because of the mass of its public debts."

Zachariae ("Über das Schuldenwesen der Staaten," in *Jahrbüchern der Geschichte*, Leipzig, 1830, p. 291) says: "The State is entitled to reduce its debts, indeed to repudiate them entirely, in so far as it is no longer in a condition to raise the funds, aside from current expenses, to pay the interest and principal of the public debt." Zachariae admits that, if the rights of the creditor rested upon a contract, rather than on the duty of the state to compensate those who have borne a burden in place of the state, the rights of the creditors would then be unconditional and the nation would have to pay, so far as humanly possible, down to the last cent. He takes, however, the other view. He admits that no nation may arbitrarily break its word and simply decline to pay, when it can. But he maintains that a government has a higher duty than the payment of its debts, which is to keep its citizens alive, and that creditors must be disregarded when there is no alternative. He does make a distinction between those who have voluntarily lent their money and who have concluded an aleatory contract, and those who were the victims of a forced loan. Only under *force majeure* would he consider the state entitled to disregard these involuntary creditors. (The analogy to involuntary tort creditors is significant.) Zachariae attributes no importance to the form of the contract, which, indeed, is sometimes but not always not unlike the usual corporate loan contract. Occasionally it reads like a decree or law.

Savigny (*Obligationenrecht*, Vol. 2, p. 110), doubtless influenced by a Prussian law of 1823 which provided that the state could not be sued on its public debts, concluded that public debts are "not under the private-law protection of a judge."

Rolin-Jacquemyns, a Belgian jurist, in the *Revue de Droit International*, 1869, p. 146, took the position that the making of a loan was an act of sovereignty, as was the payment. He added that any interference of another state was out of the question.

Numerous French jurists take the same view. We may cite Berr (*Etude sur les obligations*, Paris, 1880, p. 236), who says: "The Frenchman who concludes a contract with a foreign government subjects himself in advance to the laws of that government concerning the jurisdiction and the law of its courts; he renounces voluntarily the protection of his own national laws. In consequence, questions concerning the performance and liquidation of obligations directed against a foreign state can only be brought before its own courts in accordance with the rules of public law there in force."

Phillimore (*Commentaries on International Law*, London, 1882, 3d ed., Vol. 2, p. 18) says: "The English courts have decided that bonds payable to bearer issued by the government of a state only create a debt in the nature of a debt of honor, which cannot be enforced by any foreign tribunal nor by the tribunal of the borrowing state itself, unless with the consent of its government," citing *Crouch v. Credit Foncier of England*, L. R. 8 Q. B. 374 (1873); *Twycross v. Dreyfus*, 5 Ch. D. 605 (1877).

Von Bar, a well-known authority (*Internationales Privatrecht*, Vol. 2, p. 663), says: "If all the creditors could actually levy execution upon the state property, they could bring the state machinery to a standstill. Public debts, therefore, issued under a special law, contracted with an uncertain number of creditors, rest upon the condition that the State is in a position—of which the State by legislation is the judge—to perform its obligations. The State has, so to speak, a *beneficium competentiae* in the widest sense; it must first preserve itself, and the payment of its debts is a secondary consideration."

Politis (*Les emprunts d'état en droit international*, Paris, 1894, p. 16) states that the pub-



2. A second group of jurists proceeds from a diametrically opposite point of view. Without discussing too fully the nature of sovereignty, they maintain that a state contracts a loan under the same legal conditions as any private corporation or individual; that the obligation of the contract is to be controlled by the law of contracts; and that when foreigners are creditors, these foreigners have the protection of international law for the fulfillment of their contract. State insolvency or bankruptcy is regarded by this school as a breach of a legal obligation by the debtor state. This school, as a rule, draws a distinction between the native creditor and the foreign creditor.<sup>21</sup>

lie loan is neither controlled by civil law nor is it a natural debt, but that a state which does not perform its contracted obligations merely loses credit and its honor. To some extent, Politis differs from von Bar, because he does regard the loan as creating rights and duties, notwithstanding the fact that the state cannot be sued or levied against. Politis declines to admit the distinction between internal and external creditors. He adds: "The assumption of a debt by a state cannot be regarded as a purely private act of a government, as would be the act of a private debtor, but constitutes a political act which the state concludes, in its sovereign capacity as a public power, in the interest and in the name of the whole people."

Another Greek writer, Kebedgy, in an article in *Clunet's Journal*, 1894, Vol. 21, pp. 59 and 504, maintains that the loan of money to a foreign state is a speculative transaction or a more or less aleatory operation.

Appleton, a French writer (*Des effets des annexions de territoire sur les dettes d'état*, Paris, 1885, pp. 17 and 18), remarks: "Creditors who are affected by a state bankruptcy entered into a speculative contract which did not give them the hoped for result; that is for them a misfortune. But their government cannot intervene in so far as the debtor acts in good faith and gives its creditors everything which it is in a position to give."

Wuarin (*op. cit.*, p. 24) also regards the contract as of an aleatory character, giving the creditor no legally enforceable right.

Zorn (*Bankarchiv*, Berlin, Vol. 6, p. 106) points out that "the payment of interest on a public debt is not a matter of private law, but is the result of the exercise of sovereign powers, and on this point there is no fluctuation in theory." He adds that "for extreme cases legal rules are unavailing." In this connection, he is thinking of losses occasioned by war or revolution, and he considers these in the field of *force majeure*.

<sup>21</sup> This second group of jurists characterizes the legal relationship between creditor and debtor somewhat differently. Not all the writers are as clear or categorical as might be desired for purposes of classification, but it may be worth while to quote a few whose views differ materially from those of the first group. This second group regards the relationship as governed, in whole or in part, by private-law concepts, and considers the creditor as having a legal claim upon his debtor, the state. This group considers him, in the event of bankruptcy, not the helpless victim of a sovereign act, but a creditor entitled to such rights as practice and arbitration may be deemed to have given him as a matter of law.

Von Gönner (*Von Staatsschulden*, München, 1826, pp. 196, 197, 173, 174) says, though not altogether unequivocally, that "public bonds fall in the category of a contract to pay money, both in the relation between debtor and creditor as in the matter of the circulation of the bonds among private holders, notwithstanding the fact that the character of the debtor, who regards the debt as a matter of State, may introduce modifications which cannot always be measured by the rules of private law."

Thol (*Handelsrecht*, Leipzig, 1879, 6th ed., Vol. 1, sec. 215, p. 644) explains that the circumstance that the debtor is a state involves no particular legal peculiarity apart from exceptions raised by positive law. He defends the position, as do many others, that we are dealing here



### 3. A third group declines to regard state insolvency or bankruptcy as a legal phenomenon controllable by legal principles, but solely as a fact

with duties or obligations of a private-law character, regardless of whether the state uses the money loaned for fiscal or administrative or other purposes.

Cosack (*Lehrbuch der Handelsrechts*, 5th ed., 1900, sec. 66) says: "The emission of a loan constitutes the sale by the borrower of his loan obligation and the attached promise to pay, to the holder of the bond. The bond is the subject of purchase and sale. The creditors are the purchasers. The purchase price is the sum which they pay to the debtor. Practically speaking, the partial creditor is in the legal position of the possessor of a bearer bond: the defenses which the debtor has are limited."

Meili (*Der Staatsbankrott und die moderne Rechtswissenschaft*, Berlin, 1895, p. 18) says that the contract of loan is a legal obligation, legally binding upon the debtor. He thinks the contract is governed by the objective law of the debtor at the time of the making of the loan, and admits that the obligation has been characterized differently by various jurists.

French literature is also represented by this school. Lewandowski (*De la protection des capitaux empruntés en France*, Paris, 1896, pp. 27, 32, 33) regards a public loan as a purely private contract. He believes that, when a state takes up a loan, it renounces all its sovereign rights and steps into the arena of private interests, subjecting itself thereby to the common law of contracts. He nevertheless concedes, in the light of the present positions a international legislation and of the facts involved in state bankruptcy, that, if the state a debtor is in bad faith, the creditor can legally do but very little, so that he concludes that perhaps after all it is only a moral obligation of the debtor.

Jozon (*Revue de Droit International*, 1869, p. 279) believes that every time a bond is transferred, a new contract between state and creditor is entered into.

Kaufmann (*Internationales Recht der ägyptischen Staatsschuld*, Berlin, 1891, pp. 14, 15) seeks to justify a distinction between internal and external creditors as follows: As to the internal creditor, he says the private person has only to do with a single sovereign state. By the contract, the private creditor acquires certain contractual rights against the debtor, but at the same time he is subject to the legislative power of the state and hence is subject to the possibility that the state may take from him those rights which by contract it has given him and must give him.

The legal position is different, however, when the state faces foreign creditors. Then, he thinks, the state is, so to speak, a subject of international law. Here he thinks only a contractual relation is involved. Kaufmann regards it as a fiction to consider the foreigner, with respect to the contractual relation, as subjected to the law and courts of the contracting state, and an even greater fiction to assume that this subjection relates not only to the time of the contract, but to all future time and subsequent changes the state might by legislation effect. Such changes in the contractual relations made by a state through legislation are regarded by Kaufmann as a breach of legal rights, whereas he seems to regard the native creditor in a different position.

Freund (*Rechtsverhältnisse der Öffentlichen Anleihen*, Berlin, 1907, p. 257) takes somewhat the same position. He thinks the internal creditor is subject to the legislation of the state, whereas the external creditor has the protection of international law. He has equal rights with his debtor, the state, and the state cannot change its obligations unilaterally.

Pflug (*Der Staatsbankrott*, München, 1898, pp. 12, 13) follows somewhat the same view.

Gerlach, in the 5th edition of Roscher's *Finanzwissenschaft*, Stuttgart, 1901, p. 277, regards the loan contract as subject to the general principles of the civil law. Every invasion by the debtor state of the rights of the creditors is regarded as an arbitrary and wrongful act. He makes no such distinction as do Kaufmann and Freund between native and foreign creditors.

It must be added that those who make the distinction between the internal and the

or event, to be dealt with in the economic, rather than in the legal, sphere.<sup>22</sup>

Some of the jurists of the last school expressed their views before the occurrence of the considerable number of bankruptcies which have taken place since 1875, when state bankruptcy became so common that something of a practice may be deemed to have developed. With this practice in mind, it is difficult to believe that the creditor has no legal rights and is subject to the whims of a debtor state. The view that he is without legal rights is also dominated by conceptual considerations confined solely to municipal law. The analytical school of jurists, whose views are shared by so distinguished a man as Justice Holmes, takes the view that there can be no legal right

external creditor do not apparently follow through the result of their differentiation. Possibly the diplomatic protection of the foreigner is in their minds, in that the foreigner's remedy may often be more effective than that of the native. They seek, however, to justify the distinction on a legal theory for which they furnish little evidence or argument. If the view were sound, the foreign creditor has a better legal position than the domestic creditor. In the event of an imminent state bankruptcy, domestic bondholders might best transfer their bonds to foreigners. In truth, in the case of Egypt, it was a great advantage to be a foreign bondholder, because special courts were set up to determine the rights of foreigners, namely, the Mixed Courts of Egypt. In diplomatic settlement and arbitration, it has also proved to be a factual advantage to be a foreign bondholder against a weak state.

In 1894, on the protest of the Council of Foreign Bondholders to the Greek Government against any reduction in the interest of the external debt or against any alteration in the system of collecting the hypothecated revenues without full accord with the bondholders, the Greek Government, through the *Chargé d'Affaires* at London, replied, January 22, 1894 [21st Rep., Corp. of Foreign Bondholders (1893), p. 86]: "I am instructed to acknowledge the receipt of your letter to my Government, and to assure your Committee and the Bondholders, that while the Government thoroughly recognize the obligations undertaken by Greece, they have acted under imperious and immediate necessity, and are convinced they can satisfy the Bondholders that it is impossible for them to carry on the Government of the country and meet their engagements in full; but whatever may be the provisional measures imposed on the Government by the imperious necessities of the situation, the Government consider that no Obligations or *Securities* can undergo any modification of a permanent character *except by agreement with the Bondholders*" [italics supplied].

<sup>22</sup> Laband, one of Germany's most celebrated jurists, in an article in the *Archiv für Öffentliches Recht*, 1908, Vol. 23, p. 200, takes the position that in all public loans, even when the state is the debtor, the legal transaction is one of private law, the state appearing not as a sovereign, as in the collection of taxes, but as any private person who might conclude contracts. The legal relation is governed by the law of the time and place of emission of the loan. Laband, however, opposes the view that there is a distinction between internal and external creditors, so far as concerns their legal position. He maintains that the state as a corporation cannot be under the law and then as a legislator, above the law. He admits that it may become incapable of paying its debts, like any private debtor. It may be unable to perform its legal obligations, in whole or in part, but these are facts, and not consequences of legal principles. This legal position is not altered by the fact that the creditors, internal and external, may be unable to enforce their rights against a state acting even in bad faith.

Laband may be characterized as the representative of a third school, which regards state insolvency and bankruptcy as a mere fact, from which no conclusions can be drawn as to the legal relations existing between the parties.

Rotteck, in the 2d edition of his *Staatslexikon*, had already taken this position. It is also adopted by Escher and by Manes (p. 152).

without a legal remedy; and as there is no legal remedy, they maintain, by a private individual against a state without its consent, there can be no legal rights between the individual and a state. The argument proves too much. If true, it would be wrong to speak of a "contract" with the United States by a private individual prior to 1855, when the United States first became suable in contract. In truth, this analytical theory was confined to private relations under a system of municipal law and was not intended by Austin and his followers to deal with public relations in which one of the parties is the state. As a matter of fact, even if the state cannot be sued on its bonds in municipal courts, arbitral tribunals and Foreign Offices and private creditors dealing with defaulting states have dealt with the relations arising out of breached contracts as legal relations and have dealt with them according to rules of law common to states of Western civilization. This is evident from the transactions concerning numerous defaulting states on the European and American Continents in the 19th and 20th centuries.

#### VI. IS THE LOAN CONTRACT GOVERNED BY INTERNATIONAL LAW?

There has been some difference of opinion as to whether a loan contract between a state and a foreign bondholder comes under the control of international law. Wuarin seems to think that it does.<sup>23</sup> Freund thinks such a loan so similar to international contracts that it should be governed by international law. Von Liszt is inclined to that view, because he maintains that the state of the bondholders of a defaulted debt has the right to interpose on their behalf to hold the defaulting state to the performance of its obligations.

Bluntschli and Pflug<sup>24</sup> assert, correctly it is believed, that the loan contract between a state and foreign lenders is not an international contract nor controlled by international law. Unless special rules are to be found in the contract itself, it is probably governed by the law of the debtor state. It is a relation between a state and private individuals, not between a state and another state. It is a relation of municipal law, public and private. Good offices may be employed by the governments of bondholders to bring about the performance by a debtor state of its obligations or to assist bondholders in effecting a reasonable adjustment. But when there has been a denial of justice by the debtor state toward the alien creditor, international law, speaking through the creditor's government, enters upon the stage in its own right. The fact that, as a general rule, presently to be discussed, the government of the lending creditor will not, on mere default of the debtor state, undertake to intervene in his behalf is the best evidence of the fact that the original relation is not one of international law.

This does not militate against the argument that international law might well provide machinery by which state insolvency may be adjusted to the mutual advantage of the defaulting state and the bondholders.

<sup>23</sup> Wuarin, *op. cit.*, 35.

<sup>24</sup> Cited by Manes, *op. cit.*, 153.

Proposals of this kind have been made by Meili, von Bar, and others. A French publicist, Watrin, has recently devoted a book to this subject.<sup>25</sup> Several writers have undertaken to state the considerations which a court or a board of arbitration ought to have in view in reorganizing the finances of a defaulting state.<sup>26</sup>

<sup>25</sup> Watrin, G. *Essai de construction d'un contentieux international des dettes publiques*. Paris, 1929.

<sup>26</sup> We shall here refer only to Wuarin and Sir John Fischer Williams. Wuarin (*op. cit.*, 128-129) suggests the following procedure:

(1) The arbitrators must first examine the bonds. This examination will comprise the authenticity of the bonds, their denomination, and the price at which they were issued on the market. The existence of discounts and premiums must be established, with an indication of the redemption value and the cost of emission.

(2) The arbitrators should designate a certain number of experts who will meet in committee and draft a report after investigation on the following points:

- a. A consideration of the economic condition of the state; of its resources; the future development to be anticipated; the revenues collected in the past; critical examination of the system of collecting taxes; ameliorations which might be introduced in the kind and method of collecting taxes; consideration of the new burdens which might be imposed, without injuring the economic development of the country or its people.
- b. A critical examination of the budgetary situation over a period to be fixed by the arbitrators, but which might be fixed, in principle, at ten years; an indication of the budgetary deficits and an investigation of their causes; the elaboration of a draft of a normal budget.
- c. Conclusions of the experts on the economic situation, in particular a proposal concerning increases of taxes and budgetary economy which might be introduced, and an indication of the benefit to accrue to the debt service.

(3) After taking cognizance of the report of the experts, the arbitrators will give their judgment, taking account of the importance of the claim as established by the experts. They may also decree a reduction of the capital or interest of a debt, or its consolidation, or any other solution; and, if within their jurisdiction, they may designate the comptrollers of the revenue.

Sir John Fischer Williams goes somewhat further in suggesting the considerations to be taken into account, and lays emphasis upon the priority of internal needs of the state, in order that it may continue its functions. He says, in his lectures on "Some legal aspects of international financial problems" (reprinted in his volume, *Chapters on Current International Law*, 1929), 327-329:

"A Court that had to formulate the principles of decision in the matter of enforcing State debts might perhaps direct its attention to some such considerations as the following:

"*First:* The debtor State must continue its activities. The enforcement of payments which cannot be made without destroying the existence or the proper discharge of the duties of the State to its nationals is always immoral and usually impossible.

"*Second:* The question what are the internal duties of a given State at any given time is a question of fact to be decided by the standard of the judgment of an ordinary and reasonable man: a backward State which had never developed a regular system of State education could not claim suddenly to do so at the expense of its creditors; a State threatened by no external aggression could not claim the luxury of large military forces. On the other hand, the nationals of an advanced State could not be deprived of their educational privileges, nor could a weak and threatened State be made to forgo all means of military defence.

"*Third:* The main element in estimating the financial capacity of a State is the taxable wealth of its citizens, rather than the material assets of which as between itself and its citizens the State may happen to be the owner. To hold otherwise is to make the measure of the foreign liabilities of a State vary with its own internal arrangements. Although the private property of citizens cannot be directly seized by a foreign creditor in payment of a State debt, the foreign creditor is justified in expecting that private citizens will not be allowed to retain

The Egyptian Commission, in its report of April 8, 1879, undertook to rank creditors according to the priorities among creditors in bankruptcy determined by the Commercial Code of Egypt, namely, (a) privileged creditors, (b) creditors having specific pledges, and (c) general creditors. Although class (a) according to the code would have included only employees and pensioners, the commission suggested that certain groups in class (c) be lifted into class (a), and this was actually done by the Law of Liquidation of 1880.

#### VII. SECURITY

The legal effect of giving security for the payment of principal and interest on a loan varies according to the nature and terms of the security given. It is important, however, not only to examine the express terms of the security, but also to observe what in practical effect has been the result. It has already been noted that the loan contract can not, as a rule, be enforced in municipal courts, either of the state of the creditors or of the borrowing state. Similarly, it will be found that security, unless in the unusual form of a mortgage on specific property, or of a pledge of movables delivered to the creditor, or of an assignment of revenues administered directly by the creditor, will be difficult to enforce in municipal courts. Nevertheless, it is an established fact that the giving of security, even in such a form as a promise to assign specific revenues for the payment of principal and/or interest, is of some value in the event of default and subsequent reorganization of the debt.

It may also be noted that, while governments usually decline to interpose on behalf of the holders of defaulted bonds, they have interposed in the event of diversion of security, even of the weakest kind, on the ground that such diversion evidences not mere inability to pay, but bad faith.<sup>27</sup>

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wealth which can fairly be regarded as going beyond the proper needs of their several lives and occupations while the State debts remain unpaid.

"Fourth: Regard must be had to the circumstances in, and the purposes for, which the loan was contracted and the representative or non-representative character of the government which contracted it. A creditor who claims for money lent to satisfy the personal whims of a despot or dictator has not so good a claim as one who advanced his money for the economic development of the country on the faith of the legislative act of a representative assembly.

"A creditor who advances money to a belligerent during a war to some extent adventures his money on the faith of the borrower's success. A system of international treaties is conceivable by which the contracting Powers would bind themselves that if any State resorted to war against the decision of an international court, contracts of loan made by that State during the course of the war should not be recognized after its termination.

"Fifth: For the payment of a foreign creditor involving *ex vi termini*, the transfer out of the paying country of goods, or the performance outside that country by its nationals of services, possessing an economic value (except in rare cases when the creditor is willing to leave his property in the debtor country), regard must be had in fixing the liability of the debtor country to the facilities which it possesses for foreign trade and to the economic policy of those countries which might reasonably be expected to trade with it."

<sup>27</sup> Instances in which the diversion of security has induced diplomatic protest are found in the proposal of Great Britain in 1913 to dispatch a warship to Guatemala for the collection of unpaid interest and capital on bonds held by British subjects, after Guatemala had diverted an export tax—security for the loan—to other purposes.



In the consideration of the different types of secured loans, it may be well to classify them according to their nature and type.

A loan secured on the "general revenues" of the state. Such a loan is, in fact, an unsecured loan. Obviously, every state contracting a debt and promising to pay it would pay it out of its revenues. Politis<sup>28</sup> considers this form of clause something of a deception upon the creditor, though it is probable that no creditor is now deceived by such language.

A loan secured by the pledge of special revenue. Unless something is delivered into the possession of the creditors which they can levy or foreclose upon in the event of default, such a so-called "pledge" is probably merely a promise to use certain named revenues for the liquidation of interest and principal on a specific debt. The administration of the revenues remains in the hands of the government, and the promise to use them for the service of the loan constitutes merely a promise collateral to that involved in the agreement to pay interest and principal. It has hardly the character of a lien, because the state itself has only a claim to receive these assets from future taxpayers. It subjects this claim to the promise of paying its creditors, which means that the creditors have a first claim on the asset before any other creditors, and even possibly before the needs of the state itself. But in municipal courts such a promise probably has no greater value than the promise to pay the debt itself.<sup>29</sup>

Notwithstanding the lack of judicial relief in municipal courts, the

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Lord Salisbury in 1879 protested against the diversion to a new loan of the security pledged by Turkey to the loan of 1862, and in 1881 the security diverted was duly restored.

Secretary Lansing, in an instruction to the American Minister to Ecuador, Dec. 22, 1915, stated, on the diversion by Ecuador of the customs revenues pledged to the discharge of the bonds of the Guayaquil and Quito Railroad, to the expenses of the Ecuadorian Government: "This Government will not countenance any injustice to legitimate American interests and will insist that the Government of Ecuador comply with contractual obligations." (For. Rel. 1915, p. 373.) See also the protest of the British Ambassador to the financing of public works by Ecuador out of funds pledged to the holders of these railroad bonds, *ibid.*, 351.

The Haitian Government, in 1914, diverted from the National Bank of Haiti customs duties constituting the security for foreign bond issues. (For. Rel. 1915, p. 511.) As a result of American intervention, the rights of the bank were reinstated. After the American occupation, the security of the foreign bonds was diverted to internal needs, but later the foreign bonds, issued in French francs, were bought up in depreciated francs.

<sup>28</sup> Politis, *op. cit.*, 92. See, on security, the article by Feilchenfeld, Elrick and Judd, "Priority problems in public debt settlements" (1930), 30 Col. Law Rev. 1115.

<sup>29</sup> That it has but little value in municipal courts is evident from a decision of the Court of Paris, June 25, 1877 (Sirey, 1878, I, 345), holding that, in spite of the pledge by Peru of the proceeds of guano and the repeated use of such expressions as "engagement," "affectation," "assignment," "general" and "special mortgage," the guano had not been pledged or mortgaged, for it had not been placed in the possession or control of the creditors, but was entirely under the control of the Peruvian Government. (Politis, *op. cit.*, 93, note.) Frederick the Great is stated to have said that "all guaranties are like filigree work, more useful to satisfy the taste than of practical utility." (Martens, Introduction, p. 68, n. 1; Vattel, II, c. xiv, sec. 239, n. 1; Pradier-Fodéré, Traité, II, sec. 1014.)



assignment of special revenues does in practice, and it is believed in international law, have a very definite value. We are considering here revenues not administered by or placed under the control of creditors. By such an assignment of revenues, a double obligation is imposed upon the debtor state which most states would hesitate to violate. Moreover, bondholders having assigned revenues are in a better position than ordinary bond creditors, in the event of reorganization of the debt. This is illustrated in the debt settlements of Portugal, Egypt, Turkey, and Greece,<sup>30</sup> where assigned revenues and security were of great value in determining priorities of payment or of amortization.<sup>31</sup>

#### VIII. DISTURBANCE OF SECURITY UNDER NECESSITY OR BY AGREEMENT

Nevertheless, it is not uncommon to find that security has been diverted, with or without the consent of the bondholders, whenever the necessities of the financial situation of a country required it. This does not mean that the secured creditors are disregarded. But their individual rights, as the Egyptian Commission of 1879 said,<sup>32</sup> must yield to the general interests.

<sup>30</sup> In the Portuguese reorganization of 1892, while other loans had to bear a reduction of interest, there was no such reduction in the case of the 1891 loan, which was secured by the revenues of the tobacco monopoly. In the case of the reorganization of the Egyptian debt in 1880, bondholders having security were preferred among themselves according to the nature of their security. By such assignment of revenues, the state tacitly agrees not to contract any new loan secured by an assignment of the same revenues. It also tacitly agrees not to divert the assigned revenues to any other purpose—an agreement which has the sanction of international law, in that diplomatic interposition has taken place where diversion was threatened. Messrs. Madden and Nadler, in their book on *Foreign Securities* (New York, Ronald Press, 1929, p. 180), point out that assigned revenues materially limit the borrowing capacity of a country and, therefore, have great economic importance.

<sup>31</sup> The security of the Egyptian loans assured the holders, of three different types, preference in new security granted and in interest rates. The Turkish guaranteed loan of 1855 was not impaired. By the decree of Mouharrem of 1881, the Turkish bonds were scaled down according to issue price, and priority in amortization granted according to the security held. Four classes were made. In the Greek case of 1897, security determined priority of amortization, as well as the time of restoration of the original interest rate. The Russian indemnity exacted from Turkey after the war of 1877 was not permitted to disturb loans, or the security on loans, to foreigners. Phillimore, II, 14, and citation of Parliamentary Papers, Turkey No. 39 (1878), and Turkey No. 20 (1880). So Turkey, after its successful war with Greece in 1897, was obliged not to disturb by its war indemnity the security previously granted by Greece to bondholders. The 5.2% of the customs revenue of Venezuela which constituted security for the diplomatic debt was not disturbed. The security given to the Ethelburga Loan Syndicate of 1909 in Nicaragua was not disturbed by the subsequent settlement, but was expressly recognized in the agreement of 1917 for the distribution of the Canal Fund payment from the United States.

The United States insisted in 1915, in the case of China, that "the service of the loans contracted prior to 1900 which has priority over the Boxer indemnities as a charge on the maritime customs revenue" was not to be disturbed in order to meet deficits of the government. (For. Rel. 1915, pp. 209, 210.)

<sup>32</sup> *Doc. Dipl., Egypte, 1880, p. 225.*

In any reorganization, they are given a preferred position over unsecured bondholders, either as to amount, time or mode of payment, and when one form of security is exchanged for another, it is usually with the consent of bondholders' representatives. Public exigencies may occasionally demand a financial reorganization, including disturbance of security, and to these exigencies creditors must yield.<sup>33</sup>

#### IX. LOANS SECURED BY MORTGAGE OR PLEDGE

Strictly speaking, a mortgage requires compliance with all the legal conditions enabling the creditor to foreclose on specific realty; and a pledge requires the delivery of personalty to the creditor, or some third party not under the debtor's control. This was not always so in the early Roman law, but it is true in modern civil law. Perhaps the different connotations of the term "pledge" in its historical development account for the loose use of the term "pledged revenues" in modern loan contracts. While the mortgage of property by the debtor state is now somewhat unusual, it was not uncommon before the 17th century, and a few modern illustrations may

<sup>33</sup> The Egyptian Commission of 1879 recommended that the special pledges of this class of creditors "should be respected so far as possible under the actual condition of affairs," on the ground that it was "the natural consequence of the application of the principle that special pledges ought to be respected so far as possible." (*Doc. Dipl., Egypte*, 1880, p. 225.)

Security was modified or changed in Egypt in 1880, when the security of the Moukabala loan was substituted by the revenues of two provinces, and a broad revision of security was undertaken.

In 1893 a crisis in Greek finances made necessary the borrowing of more money or the curtailment of the state's liabilities. Failing to get a new loan, Greece paid the interest coupons of the 1881, 1884, 1889 and 1890 loans in bonds (1893) bearing 5% interest. The Monopoly loan, on account of its special guarantees, was at that time excluded from this operation. (21st Rep. Corp. For. Bondh. (1893), p. 83.) Later the issue of funding bonds was suspended and instead 30% of the coupons of all issues, including the Monopoly loan, was paid. The bondholders protested and the French and German Government representatives in Athens remonstrated officially. After some correspondence between representatives of the bondholders and the Greek Government, the explanation was offered by the government as quoted in the last paragraph of footnote 21, *supra*.

The loan of the Turkish bankers of 1877 was secured in 1879 by the Turkish Government on certain revenues already pledged to the loan of 1862. The bondholders protested and obtained the support of their governments. The British Government protested officially against the diversion of pledged revenues. (Blaisdell, *European Financial Control in the Ottoman Empire*, p. 88.) The Turkish Government in 1881 denounced its agreement with the Turkish bankers and returned the diverted revenues to the service of the foreign debt. (Blaisdell, *op. cit.*, p. 92.)

In Santo Domingo, in 1901, the customs revenues were taken from the San Domingo Improvement Co. After protest by the United States, an agreement was made by Santo Domingo with the company and an arbitration held as to the method, including new security, by which the agreed debt was to be discharged. In Haiti, after 1914, the security for external and internal loans was diverted, a reorganization waiting until 1919. Some of the secured loans were reduced from 5 to 25%, probably depending on the nature of the loan and the security.

be found in the Egyptian loans of 1866, 1870, and 1876, and in the Honduras loan of 1869. It has but little practical importance.<sup>34</sup>

The pledge of revenues, whereby the creditor or an independent bank or agency takes control of the proceeds of the pledged asset, is of great value. In most reorganizations such pledges insure the holders a priority over other creditors, and only under extraordinary circumstances would such secured creditors be seriously disturbed.<sup>35</sup>

An even more rigid security is to be found in the treaties between the United States and Santo Domingo and Haiti, whereby the debtor country agreed that an American representative was to act as general receiver to administer the pledged revenues—in Salvador, in case of default.

In the case of the League of Nations loans to Austria, Hungary, and Bulgaria, the pledged revenues are collected by representatives of the borrowing country, but the proceeds are turned over to an agent of the lending countries or the lending banks, who, after paying principal and interest on the outstanding debt, returns the balance of the revenue to the borrowing country.<sup>36</sup>

<sup>34</sup> The Egyptian loan of 1876 appears to have been guaranteed by the Khedive by a mortgage on the railroads of Egypt and on the port of Alexandria, though commentators state that, in fact, only the revenues were given as security. The Egyptian Daira Loans of 1866 and 1870 were secured by a mortgage on the private domain of the Khedive. States governed by the civil law also make a distinction between their public property, and their private domain which, though owned by the state, is not used for general public purposes. Such property is controlled by the rules of civil law governing the alienation of property, and such "private" state property can be mortgaged. Honduras in 1869 gave a mortgage on its private domain and its forests, though the loan went into default in 1873, and the mortgage does not seem to have been foreclosed. Such property in theory could be foreclosed by the creditors, and they have a security from which, legally, they cannot be dislodged. Whereas, in the times when kings borrowed personally, the public domain was not inalienable and hence a mortgage thereof was not unusual, today in practically all states the public property of the state used for public purposes is practically inalienable and unattachable. For that reason mortgages of such property are extremely rare, and unless the property were alienable would be of but little value.

<sup>35</sup> In the Egyptian reorganizations, as already observed, such pledges were given priority. The Serbian creditors of the Railroad Loan were given a guaranty of the net proceeds of the line, of the customs revenues, and of the civil taxes. The Bulgarian loans secured on the tobacco tax, which was under the control of representatives of the bondholders, were given priority in the post-war settlement. The Peruvian Salt Loan of 1909 was administered by a stock company, to whom was to be paid over the proceeds of the salt monopoly, though in the period between August, 1914, and August, 1916, the difficulty of remitting to Paris and the moratorium declared in France caused a delay in the transmission of the interest.

The revenues of Greece were pledged and controlled by an international financial commission representing six great Powers, reduced after 1918 to the representatives of France, Great Britain, and Italy, to collect and distribute the state revenues assigned to the service of foreign loans.

A consideration of various aspects of pledges and assignment of revenue will be found in Jèze, *La garantie des emprunts publics d'état*, Paris, 1924, p. 120 *et seq.*

<sup>36</sup> The Polish Stabilization Loan of 1927, while not issued under the auspices of the League of Nations, has many features similar to the loans just mentioned. (Madden and Nadler,

It may be added that the legal effect of the assignment of revenues is governed by the law of the debtor country. The loan having been contracted in that country, its legal incidents would usually be controlled by the local law.<sup>87</sup>

#### X. GUARANTEED LOANS

Loans have occasionally been guaranteed by third states or even by private organizations. Grotius and other writers of the 16th and 17th centuries, still dominated by the views which prevailed in the Middle Ages, maintained that all the citizens of a state were liable for debts contracted by the state, and in the event of default, maintained the proposition that their private property could be levied upon in execution of a defaulted public obligation. This right of reprisal and the theory that the individual is responsible for the obligations of the group prevailed throughout the Middle Ages. That period also recognized the institution of imprisonment for debt. These early institutions are described by Meili (pp. 18-38). Modern times have brought changes in these institutions. The exertion of reprisal upon individual private property for the non-payment of a public obligation would be deemed demoralizing to commerce and finance, though such a practice, probably to the great detriment of foreign investment, has found its way into Article 297 of the Treaty of Versailles. Private individuals or corporations are no longer deemed guarantors of a public debt.

#### XI. DIPLOMATIC PROTECTION OF BONDS, PRIORITIES AND PREFERENCES

In the absence of effective remedies against defaulting states in municipal courts, creditors have on occasion resorted to their own governments to secure support for their claims through the diplomatic channel. There has been a considerable difference of opinion among publicists and in the practice of Foreign Offices as to whether diplomatic support should be extended in the case of such defaults.

*op. cit.*, 178.) Some loan contracts provide that a receiver representing the bondholders may be appointed in the event of default in the payment of interest. (See Polish 6% Railroad Loan, due 1940, *ibid.*, 179.)

In recent years loan contracts have contained clauses by which the debtor agrees that, if in the future he should issue any loan secured by a pledge of specific revenue, the present loan shall have priority over it or shall be equally secured. (*Ibid.*, 162, 164.)

The provision of the Dutch and former Spanish Constitutions to the effect that "the obligation of the state to its creditors is guaranteed," is probably of no special legal value. (See Meili, *op. cit.*, 84.)

<sup>87</sup> This question arose in connection with the pledge of personalty by the Turkish Government to certain French creditors. Turkey handed to these creditors certain bonds, with the privilege of realization in the event of default. When Turkey defaulted, the bonds were sold by the creditors on the French stock exchange. Turkey brought an action, contending that a judicial decision should have been obtained prior to foreclosure on the pledge in accordance with Article 2078 of the French Civil Code. The Tribunal of the Seine, March 3, 1875 (Sirey, 1877, II, 25), held that the contract of pledge was governed by Turkish law, which required no court decision as a condition of foreclosure.

*Scientific opinion.* We may discuss briefly the opinions of publicists and the practice of nations in the matter of intervention to collect public debts, by which we mean a formal official enforceable claim for payment. Westlake<sup>38</sup> has properly recognized the distinction in substance and in remedial process between contracts made with the state in its character as a fiscus or business administrator and those arising out of subscription to or transfer of a public bond. He regards honest inability to pay as a title to consideration, and unless the defaulting government presumes to treat its internal and external debts on terms of inequality unfavorable to the latter, he thinks "the assistance of their state ought not to be granted to the bondholders of public loans."

Some of the earlier writers, prominent among them Grotius and Vattel, admitted the legitimacy of reprisals against a state or sovereign who refused to pay a lawful debt.<sup>39</sup> Inability and refusal to pay are not, however, identical. Phillimore and Hall, supporting the views of the British Government, contend that a debt contracted by a foreign government toward a citizen constitutes an obligation of which the country of the lender *has a right* to require and enforce the fulfillment.<sup>40</sup> Yet Phillimore approves, as he says, "the proposition of Martens . . . that the foreigner can only claim to be put on the same footing as the native creditor of the state."<sup>41</sup> Rivier, one of the foremost authorities, has in this respect asserted a far-reaching right of intervention under circumstances far more unreasonable than those admitted by other publicists. Unless we may assume that the words italicized presuppose fraud and bad faith, his doctrine will hardly find general support, though it must be admitted that the weaker states have at times found themselves intervened against under circumstances no harsher than those mentioned by Rivier:

The fortune of individuals, subjects of the state, forms an element of the riches and prosperity of the state itself. It has an interest in the maintenance and increase of that fortune. If it is compromised by the act of a foreign state *which administers its finances badly, which betrays the confidence individuals placed in it when they subscribed to loans on conditions that are not observed, and which violates its engagements in regard to them*, the state to which the injured individuals belong is evidently authorized to take their interests in hand in any manner which it shall deem suitable; it may proceed either by diplomacy or by reprisals. . . . Individuals have not, as a general rule, the right to require of the state that it shall thus take their cause in hand. The state may refuse to act in their favor for reasons of which it is the sole judge; but if it acts, it only exercises its right. It may see to it, perchance, according to the circumstances, that its subjects are better treated than

<sup>38</sup> Westlake, *International Law* (2d ed., 1910), I, 332.

<sup>39</sup> Grotius, *De jure belli*, 3, 2, 5; cf. 1, 5, 2 and 2, 25, 1; Vattel, *Law of Nations*, Bk. II, c. 18, §§343, 347, 354, c. 14, §§214-216.

<sup>40</sup> Phillimore, *Int. Law* (3d ed.), II, c. III, 8 *et seq.*; Hall, *Int. Law* (6th ed.), 275-76.

<sup>41</sup> Phillimore, *op. cit.*, II, 14.



those of other states, or than those of the insolvent state. This is, from the legal point of view, a matter of absolute indifference [*italics supplied*].<sup>42</sup>

G. F. de Martens sanctions intervention in case of "violent financial operations" of the debtor state depriving creditors of their loans, but he adds that foreign creditors cannot demand better treatment than nationals. Although cited by Phillimore as an advocate of intervention, opponents may also find support in his ambiguous doctrines.<sup>43</sup>

The majority of writers consider armed intervention for the mere non-payment of public debts an unjustifiable procedure, their reasons being similar to those advanced by Dr. Drago, to wit: that hazardous loans should be discouraged; that those making them have full notice of the risks; that foreigners cannot expect to be preferred to native creditors; that force is never resorted to except against weak states and is often a pretext for aggression or conquest; and, finally, that the loss of credit and standing incurred by the state is an ample and effective penalty for the failure to fulfill its obligations.<sup>44</sup> The objections of writers are mainly directed not to diplomatic interposition, but rather to an *excess* of interposition in the use of armed force to collect unpaid public loans.

The preponderance of opinion is, however, that under certain circumstances intervention to secure the payment of public loans is legitimate. Authorities differ merely as to the nature of the circumstances. In general we venture to suggest that intervention is not warranted in the case of an honest inability of the state to pay its debts, but only when, the means being at hand, the debtor state wilfully refuses to pay; or further, when foreign creditors are ill-treated, especially if they are discriminated against in favor of national creditors, or if certain categories of creditors are improperly and without justification preferred to others; or when special funds assigned as security to the payment of certain debts are diverted or suppressed—in short, when bad faith may be considered the moving cause of the non-payment. In the present condition of international law, in which states,

<sup>42</sup> Rivier, Alphonse, *Principes du droit des gens* (Paris, 1896), I, 272.

<sup>43</sup> G. F. de Martens, *Précis du droit des gens* (Paris, 1864), I, 298, §110. See also Phillimore, *op. cit.*, 14, and Pradier-Fodéré, *Traité*, I, §405, p. 623, note.

<sup>44</sup> These authorities are enumerated and citations to their works given in the second part of footnote 34 of Hershey's article in 1 Am. Jour. Int. Law (1907), 37; in the work of Wuarin, *op. cit.*, 155-159; and in the address of Gen. Horace Porter before the Second Hague Conference on July 16, 1907, in presenting the American proposition for the limitation of force in the collection of contractual debts. *La deuxième conférence internationale de la paix*, Vol. 2, 229-233 (1907). Also printed in English (1920). The principal publicists who oppose what we may call financial intervention are F. de Martens, Westlake, Holland, Bonfils, Calvo, Pradier-Fodéré, Rolin-Jaequemyns, Despagnet, von Bar, Liszt, Geffcken, Kebedgy, Nys, Merignhac, Feraud-Giraud, Weiss, Olivecrona, and Floecker. Gen. Porter also cited Rivier, but this must have been an oversight. See also Collas, *Der Staatsbankrott und seine Abwicklung* (Stuttgart, 1904), 51; Freund, *Rechtsverhältnisse*, etc., 271; Strupp, *Intervention in Finanzfragen* (1928).



large and small, have no common superior to control or check them, each state has the legal privilege of deciding for itself whether the conditions warranting intervention exist. In the use of this privilege, the power of enforcing its demands has perhaps occasionally been a factor not less controlling than the legitimacy or fairness of the demands.<sup>45</sup>

*British policy.* The British position with respect to interposition was expressed in the celebrated circular of Lord Palmerston in 1848 addressed to the British representatives in foreign states. He then declared:

It is therefore simply a question of discretion with the British government whether this matter [the non-payment of public loans] should or should not be taken up by diplomatic negotiation, and the decision of that question of discretion turns entirely upon British and domestic considerations.

Referring to the then prevailing economic disapproval of British investments in foreign loans, as against British enterprises, he added that the British Government has

hitherto thought it the best policy to abstain from taking up as international questions the complaints made by British subjects against foreign governments which have failed to make good their engagements in regard to such pecuniary transactions. . . .

But, nevertheless, it might happen that the loss occasioned to British subjects by the non-payment of interest upon loans made by them to foreign governments might become so great that it would be too high a price for the nation to pay for such a warning as to the future, and in such a state of things it might become the duty of the British government to make these matters the subject of diplomatic negotiation.<sup>46</sup>

<sup>45</sup> The decision of the Hague Permanent Court of Arbitration in the Preferential Claims case of Germany, Great Britain and Italy against Venezuela has been considered an approval of the use of force in the collection of claims based on contract or public debt. While it is true that the use of force appears to have been sanctioned by the tribunal by the allowance of preferential treatment of the three blockading Powers, it is certain that only a small part of the claims pressed arose out of contractual debts. The primary reason of the blockade was the stubborn reiteration of Venezuela of the exclusive jurisdiction of its national courts and the absolute refusal to arbitrate. Castro's arrogance exhausted the patience and temper of the Powers. See article by Basdevant, Jules, "*L'action coercitive Anglo-Germano-Italienne contre le Venezuela*" (1902-1903), *Revue générale de droit int. pub.*, Vol. 2, 363-458. Hershey, Amos S., "The Venezuelan Affair in the Light of International Law," *American Law Register*, Vol. 51, 249-267. The Hague decision is criticized by Andre Mallarmé in an article, "*L'arbitrage vénézuélien*," in *Revue générale*, Vol. 13, 423-500. For the correspondence, see *Asuntos Internacionales*, two volumes of the Yellow Book of Venezuela published in 1903, and extracts printed in the appendix to Ralston's Report of the Venezuelan Arbitrations.

<sup>46</sup> Palmerston's circular is quoted in full by Phillimore, *op. cit.*, II, 9-11, and by Hall, 276-277. Other secretaries for foreign affairs of Great Britain have expressed, in language even more unreserved than that of Palmerston, the policy of non-interference. See, for example, Canning and Aberdeen (28 St. Pap. 961, 967, 969), Russell (52 St. Pap. 237-239), Derby, Granville (quoted by Phillimore, *op. cit.*, 12-13), and Salisbury (cited by Hall, note p. 277). Balfour, when Prime Minister in 1902, supported this view. See Scott's Hague Peace Conferences, Vol. 1, 402.

Palmerston's note has occasionally been misinterpreted by writers who use his note in support of an argument for non-intervention. When he stated that interference was "for the British government entirely a question of discretion, and by no means a question of international right," he did not intend to cast any doubt on the right of Great Britain to interfere, but meant to indicate that there was no question about the right to interfere. The next sentence of the note shows this clearly.<sup>47</sup>

Lord Derby, November 5, 1875, in connection with the request for intervention by British holders of Turkish bonds, said: <sup>48</sup>

Our invariable rule has been to give moral and unofficial support where we thought it was merited or where we thought it would be useful, but to avoid committing ourselves to any official demand. . . . I think the principle is a sound one, because, if it were understood in this country that persons lending money to foreign states would be supported by the official assistance of their own government, the obvious effect of that would be to enable the poorest states, and those with the least credit, to get money on much better terms than they otherwise would. The question which arises here is whether any peculiar or exceptional circumstances exist in regard to these Turkish loans. Now, no doubt we have guaranteed Turkey, but that does not constitute an exceptional circumstance, for we have done the same thing for Greece; we have fought for Turkey, but that cannot be looked to as forming an exceptional claim, for we have done the same thing for Spain. The question which really does create some difficulty is the language which has been held by some of our public men in Parliament in connection with these loans, but I do not think it goes so far as a guarantee in any case.

Lord Derby had examined carefully what Palmerston, Clarendon, and Russell had said; while of the opinion that they went further in extending moral support to the Turkish Government than was expedient, Lord Derby did not think they spoke in a way

which would reasonably justify the expectation that the Government would interfere forcibly to compel the payment of any debt in case of default. . . . I think the part which the British Government took does not go farther than to pledge those who now represent that Government to use such moral influence as they can bring to bear to secure its creditors.<sup>49</sup>

Subsequent secretaries of foreign affairs, emphasizing the speculative character of the transaction of subscription to a foreign loan, have declined

<sup>47</sup> See, for example, Gen. Porter's address of July 16, 1907, printed separately, and quoted in Scott's *Hague Peace Conferences*, Vol. 1, 402.

<sup>48</sup> Blaisdell, *op. cit.*, 82, 83.

<sup>49</sup> Parliamentary Papers, Turkey No. C. 1424 (1876), Dispatch 47. Mr. Hyde Clarke, of the Corporation of Foreign Bondholders, had been advised similarly four years earlier. *Ibid.*, No. C. 1077 (1874), Dispatch 61. Prior to 1879, instructions of the British Foreign Office to its representatives in Constantinople, and replies to inquiries and protests from British subjects, were in all cases to the effect that unofficial support only would be given. *Ibid.*, No. C. 1424 (1876), Dispatches 64, 65, 68, 69, 73, 90, 91, 97, 123.

to do more than exercise their good offices in behalf of unpaid bondholders. Great Britain's practice of non-interference is entirely a matter of policy and is not to be construed as the recognition of an international legal principle.<sup>50</sup>

*United States policy.* The practice of non-interference of the United States, on the other hand, has been not only a matter of policy, but the carrying out of a fundamental principle that the diplomatic interposition of the United States cannot be invoked (within the recognized limitations) in behalf of contractual claims.<sup>51</sup> If certain revenue or security has been set aside for the repayment of a loan, it seems probable that the United States would, following the practice of other nations, interpose diplomatically to prevent any diversion of the security or the pledged revenue.<sup>52</sup> Attorney-General Cushing, in the course of an elaborate opinion on the Texas bonds question, declared that

A public creditor, like a private creditor, has a general right to receive payment out of the property, income, or means of his debtor. A special pledge of this or that source of revenue, of this or that direct tax, when made by a government, renders such source of revenue, like a mortgage or deed of trust given by a private individual to his creditor, a specific lien, a fixed incumbrance, which the government ought not in justice to the creditor, to abolish, lessen, or alienate until the debt has been satisfied.<sup>53</sup>

In the case of certain bonds issued by Haiti to American citizens for work and materials furnished, Secretary of State Sherman protested against a proposed law of Haiti having in view the conversion of the bonds at a rate greatly depreciatory of their value.<sup>54</sup> There would indeed seem to be some difference between bonds purchased in the open market as an investment and bonds received in payment for services and goods, in the hands of the original parties.

Both the United States and Great Britain have authorized their representatives abroad to receive payment for their citizen bondholders, as a matter of convenience both to the debtor government and to the citizen,<sup>55</sup> and where the bonds of one foreign government have been wholly or largely held by the citizens of another, the United States has on one occasion at

<sup>50</sup> The proposed action of Great Britain in 1913 to dispatch a warship to Guatemala to collect the unpaid interest and capital on bonds held by British subjects, may be charged to the bad faith of Guatemala in diverting the security of the loan, an export tax on coffee, to other purposes.

<sup>51</sup> Citations in Moore's Digest, VI, 705-707, and Wharton's Digest, II, 655, to the effect that as a rule the United States will use only good offices in support of a contract claim.

<sup>52</sup> See illustrations *infra*. See also opinion of Little, Commissioner, in *Aspinwall (U. S.) v. Venezuela* (Dec. 5, 1885), Moore's Arb., 3641-3642.

<sup>53</sup> Opinion of Sept. 26, 1853, 6 Op. Atty. Gen., 130, 143.

<sup>54</sup> Mr. Sherman, Sec'y of State, to Mr. Powell (Oct. 26, 1897), Moore's Dig., VI, 729.

<sup>55</sup> Mr. Frelinghuysen, Sec'y of State, to Mr. Wright (Jan. 17, 1884), Moore's Dig., VI, 713; Phillimore, *op. cit.*, II, 13.

least, in the case of Russian bonds, sanctioned the endeavor of the government of the creditors to effect by diplomatic negotiation an adjustment of their claim.<sup>56</sup>

It has already been observed that the unjustified diversion of security has been regarded as a ground for intervention.

*Claims liquidated in bonds.* Where the loan has been liquidated and a new agreement for payment made, the origin of the debt seems to have been no deterrent against its enforcement. So in Mexico, in 1861, Lord Russell withheld recognition of the Mexican Government until Mexico had agreed to carry out an arrangement made with British bondholders.<sup>57</sup>

This may raise the question whether a tort or expropriation claim which has been paid in bonds, loses its position as a tort claim and is converted into a bond claim, to be treated accordingly in the event of default. For example, the holders of awards before the Mixed Claims Commission, United States and Mexico, may, like those in Haiti, Nicaragua, and Santo Domingo, receive bonds for a part of their awards, as will, probably, the owners of land expropriated for *ejidos*. Should these bonds go into default, it will be an interesting question whether the holders are to be regarded as original tort claimants or as mere bondholders. It is suggested that, inasmuch as they became creditors of Mexico involuntarily, and received bonds, if at all, with the approval of their government, they have a preferred position as tort claimants, at least so long as the claimants originally injured or the claimants who received awards, hold the bonds.

*Reason for non-interposition.* The reason for the customary policy of non-interposition for the collection of unpaid bonds is not far to seek. Governments maintain that their citizens in lending money do so with their eyes open, that they make their own terms and take account of the usual risks, and that they should not involve their fellow nationals in diplomatic claims merely because they entered upon an unwise speculation. When, however, there is bad faith by the borrowing government, such as the diversion of security or fraud or shocking disregard of the rights of creditors, as in the case of Santo Domingo and Nicaragua, a different position has been assumed. Where the Foreign Office or State Department, for political reasons, desires the aid of bankers in financing or adjusting the debt of a foreign country, it necessarily assumes greater political responsibility for the discharge of the loan. While not a guaranteed loan, such loans, as in the cases of Nicaragua, Santo Domingo, and Haiti, have had the active coöperation and support of the State Department.

The fact that Foreign Offices of lending bankers and citizens now often require their consent for the floating of an international loan, does not con-

<sup>56</sup> Mr. Frelinghuysen, Sec'y of State, to Mr. Wright (Jan. 17, 1884), Moore's Dig., VI, 713. He stated, however, that the occasions on which this had been done were not common enough to form a rule of action.

<sup>57</sup> Lord J. Russell to Sir C. Wyke (Mar. 30, 1861), 52 St. Pap. 237, 239.

stitute a promise of diplomatic support, but merely indicates the increasingly closer relationship between finance and politics. The inferences to be drawn from the consent must be determined by the circumstances.

*Protective committees.* The fact that lenders and creditors are well aware of the policy, at least of the British and American Governments, has led them to form protective committees, such as the Council of the Corporation of Foreign Bondholders, and similar French, German, Belgian and other committees,<sup>58</sup> to deal directly with the governments of defaulting states in effecting settlements and reorganizations. These committees, counting upon the sanctions embraced in their control of credit, are often able to effect better and more sustainable terms than political intervention could achieve. The governments of such creditors, aware of the political implications of foreign loans, take an interest in the loan and in any settlement effected, on that very account. On some European stock exchanges, at the request of the government, the bonds of states in bad odor are not quoted. Whenever private negotiations are likely to result in political complications or if the readjustment of a foreign debt is of political importance, the governments of the creditors are likely to participate, either by the exercise of good offices, or guaranty, or in some other form. This was the case in the League of Nations loans to Austria, Hungary, and Bulgaria, in the cases of the Egyptian, Greek, and Turkish reorganizations, and in the Santo Domingan, Nicaraguan, and Haitian settlements. In the absence of such political interest, however, creditors are left to their own devices to secure such settlement as they can with the defaulting state.

Perhaps it may not be improper to suggest that the United States Government would do well not to participate directly in any protective committee, but to permit the parties in interest to work out their own arrangements, and to interfere only to the extent that public interest may be deemed affected or involved. The extensive defaults to which American bondholders have become exposed in recent years will probably make necessary the formation of a standing bondholders' protective committee, on the order of the Corporation of Foreign Bondholders in Great Britain, which should be financed, not by the government or by a foundation, but by the bankers and bondholders in interest, possibly by the deposit of a small percentage of every foreign loan or by some system of assessment.<sup>59</sup>

*Tort claims.* Somewhat different is the position with respect to tort claims. Here governments are more ready to find a denial of justice to their injured nationals. It is perhaps unnecessary to remark that good offices are exercised somewhat liberally to persuade a foreign government to carry

<sup>58</sup> The British Council of the Corporation of Foreign Bondholders, *Ständige Kommission zur Wahrung der Interessen deutscher Besitzer ausländischer Wertpapiere*, *Association Belge pour la Défense des Détenteurs de Fonds Publics*, *Association Suisse des Banquiers*, and *Association Nationale des Porteurs Français de Valeurs Mobilières*.

<sup>59</sup> Cf. Allen W. Dulles, "The Protection of American Foreign Bondholders" (April, 1932), 10 *Foreign Affairs*, 474.



out its duties towards aliens, particularly the duty to do justice to them. Claims for money damages are, as a rule, not advanced, unless there is a denial of justice. This is, in fact, more easily established in the case of tort than in the case of contract or bond claims, for the mere inability or futility to sue a government or official on a contract or bond claim will not usually induce diplomatic interposition, whereas such inability or futility to sue in the case of tort claims will induce interposition. The reason for the difference in treatment of the two classes of claims is probably to be found in the premise that contracts are voluntarily entered upon and normal expectations are presumably taken into account, including the chances of non-payment of the loan or non-fulfillment of the contract. In tort, however, there is no expectation of injury which can be guarded against. Legal liability or responsibility is the sanction for defeated expectations in law.<sup>60</sup> No person has the expectation of being tortiously injured by a government and cannot and does not take precautions. Hence tort liability is more commonly insisted upon by claiming governments than is contract liability. Thus, in diplomatic settlements, tort claims have a preference over contract claims.

*Bond claims before arbitral tribunals.* Bond claims have not fared well before Mixed Claims Commissions. Very little light is thrown upon the subject by the results of these arbitrations, except as by their dicta the commissions express the opinion that governments have the *right* to press the claims of bondholders of a foreign debt, though they generally admit that in practice such claims are not diplomatically presented. As a general rule, however, jurisdiction has been declined—usually for the reason that governments are not in the habit of presenting such claims diplomatically and because of the unwillingness of commissions to assume that they are intended to exercise jurisdiction in the absence of express words in the protocol.<sup>61</sup> It has been so held even where the protocol provided for the settlement of "all claims."<sup>62</sup> This last decision, rendered by Sir Frederick Bruce, Umpire, was severely criticized by Mr. Commissioner Little in the Aspinwall case before the United States-Venezuelan Commission of December 5, 1885. He held, with Mr. Findlay (Andrade dissenting), that the inclusive term "all claims" embraced bond claims. This case constitutes one important exception, prior to the Venezuelan Arbitrations of 1903, to the

<sup>60</sup> Wigmore, "Responsibility for Tortious Acts" (1894), 7 Harv. Law Rev. 315, 383, 441; Pound, *Philosophy of Law* (1922), c. IV. That is probably a legal reason for the United States to deny any liability for the defaulted debts of American States. The lender looked exclusively to the credit of the state and never had any expectation or basis for expectation that the federal government would assume the debt.

<sup>61</sup> *Overdue Mexican coupons, Du Pont de Nemours (U. S.) v. Mexico* (July 4, 1868), Moore's Arb., 3616. Opinion by Wadsworth, Zamacona concurred. See dictum of Thornton, Umpire, in *Widman (U. S.) v. Mexico* (July 4, 1868), Moore's Arb., 3467.

<sup>62</sup> *Colombian Bond Cases, Riggs, Oliver, Fisher (U. S.) v. Colombia* (Feb. 10, 1864), Moore's Arb., 3612-3616.



general rule that jurisdiction over bond claims is not exercised by international commissions.<sup>63</sup>

Before the Venezuelan commissions, sitting at Caracas, four bond claims were presented, with various decisions. In the case of the *Comp. Générale des Eaux de Caracas* (Belgium),<sup>64</sup> Venezuelan bonds payable to bearer had been issued to the corporation for certain public works. From the decision, it would seem that the general rule of non-enforcement of bond claims may be held not applicable where the bonds are issued in payment of property transferred and services rendered to the government. Although many of the stockholders were not Belgians, an award was made, with the peculiar provision that the money should be deposited in a Belgian bank and the bonds paid on surrender. The production of the bonds is likely to be essential to a claim and an award, so that where, in the case of *Ballistini* (France),<sup>65</sup> the original bonds were not produced, the claim was dismissed, Paúl, Commissioner, in a dictum, giving expression to the usual rule of the non-enforcement of bond claims before international commissions. In the case of *Boccardo* (Italy),<sup>66</sup> where national bonds were delivered to and held by the claimant in payment for merchandise furnished, an award was made on the authority of the *Aspinwall* case before the Venezuelan Commission of 1885. The fourth case, *Jarvis* (U. S.),<sup>67</sup> was dismissed because the services and supplies for which the bonds were issued (by a temporary dictator of Venezuela), were rendered to an unsuccessful revolution which had not been recognized by the Government of the United States, and hence presumably they were not valid obligations of Venezuela.

The question whether franc bonds issued by Brazil and Serbia and

<sup>63</sup> *Venezuelan Bond Cases*, *Aspinwall*, Executor of G. G. Howland et al. (U. S.) v. Venezuela (Dec. 5, 1885), *Moore's Arb.*, 3616-3641. This claim was dismissed by the mixed commission under the convention of April 25, 1866. The findings of this commission were reopened because of the alleged fraud of the arbitrators. Under a strict construction of the protocol, *Bates*, Umpire, dismissed the *Texas Bond* cases before the British-U. S. Commission of Feb. 8, 1853, *Moore's Arb.*, 3594. One reason was that they had not been treated by Great Britain as a subject for diplomatic interposition. The decision is criticized by *Westlake*, vol. 1, 77-78, citing *Dana* in *Dana's Wheaton*, §30, n. 18. Jurisdiction was exercised by the Mexican Commission in 1868 over a stolen bond, *Keller* (U. S.) v. Mexico (July 4, 1868), *Moore's Arb.*, 3065, on the ground of fraudulent destruction of specific property having a definite value, and certain assurances by the government. See also *Eldredge* (U. S.) v. Peru (Jan. 12, 1863), *Moore's Arb.*, 3462. The failure to fulfill the obligations of a bond issued for supplies was held not an "injury to property" by the U. S.-Mexican Commission of 1868 (*Manasse* case, *Moore's Arb.*, 3463), although the failure to pay for supplies furnished under contract had been so construed.

<sup>64</sup> *Comp. Générale des Eaux de Caracas* (Belgium) v. Venezuela (March 7, 1903), *Ralston*, I, 271-290.

<sup>65</sup> *Ballistini* (France) v. Venezuela (Feb. 27, 1903), *Ralston*, I, 503-506.

<sup>66</sup> *Boccardo* (Italy) v. Venezuela (Feb. 13, 1903), cited in note to *Ralston*, I, 505 (not reported). See, however, the brief statement given by Mr. *Ralston* in his address before the International Law Association, 24th Report, 193-194.

<sup>67</sup> *Jarvis* (U. S.) v. Venezuela (Feb. 17, 1903), *Ralston*, I, 145-151.

owned by French citizens were to be paid in gold or paper, a question submitted to the Permanent Court of International Justice by France in 1929, really involved an alleged distortion of the terms of the contract by the defendant countries, and not mere inability to pay. The court merely interpreted the bond contract, in holding that payment in gold francs was intended and required. Yet when Mr. Snowden, Chancellor of the Exchequer, demanded of France that British holders of French bonds be paid in gold francs, he was informed that the claim was inadmissible because there was no gold clause in the French bonds in question. Thereupon, the British Government appears to have dropped its demand.

*Preferences to tort claimants.* In the reorganization of the finances of defaulting States, tort claims have usually received a preferred position, both as to rank and scaling, especially when they have been reduced to judgment and constitute a matured liquidated obligation.<sup>68</sup>

<sup>68</sup> In the settlement of defaults and the advance of claims against defaulting states, preferences have occasionally been given to the owners of tort claims. The Venezuelan Preferential Claims of 1903 were divided into three classes. The first-rank claims of Great Britain, Germany, and Italy were all tort claims. These, owing to Venezuelan recalcitrance, were not submitted to arbitration. The second-rank claims, which were submitted to arbitration, were also tort claims. Bond claims were relegated to the third class; and there is some evidence that they were included at all only because the creditor Powers wished to effect a final settlement of all claims.

In the case of Venezuela, the tort claims were, in fact, paid off by 1912, whereas the bonds were merely converted into a new issue.

In the case of the Santo Domingan settlements of 1907 and 1917, the position of tort claimants is somewhat more doubtful. The San Domingo Improvement Co. claim, which was part bonds and part tort, had been reduced in a compromise agreement and an arbitral award, and was again reduced 10% in 1907, whereas bond claims generally were reduced 50% and then settled 20% in cash and 80% in new bonds. Internal claims, largely bondholders, were even more seriously reduced. The awards of the 1917 Claims Commission were, however, paid in full by an issue of 5% bonds secured by an additional charge on the customs revenues; but claims less than \$50—over 80% of the whole—were paid in cash.

In the Haitian Protocol of 1919 the awards of the Claims Commission, primarily tort claims, were to be paid first out of the new loan provided for by the protocol.

In the Nicaraguan settlement of 1917, the Emery claim, also protocolized by agreement between the United States and Nicaragua, was maintained in full, whereas claimants before the 1911 commission were deferred in payment. Although priority out of the Canal Fund payment of \$3,000,000 was accorded to secured bondholders and the New York bankers, British tort claimants were not able to secure equality with the Emery claim. The Nicaraguan Public Credit Commission stated that they did not expect to revise Mixed Claims Commissions' judgments on claims in the hands of the original claimants, except by mutual agreement. Claims in the hands of speculators or third parties were to be heavily scaled from 50% to 70%, and all claims less than \$1,000 were, if possible, to be paid in cash. (For. Rel. 1917, p. 1144.)

In the case of Egypt, judgment creditors (to some extent tort claimants) before 1880 were paid without scaling, but received only 30% in cash and 70% in bonds of the privileged debt, and this notwithstanding a suggestion of the Debt Commission of 1879 that judgments obtained between April 6, 1876—when bankruptcy was alleged to have begun—and 1879 were void. Judgments after 1880 were probably paid in full. The Alexandria Riot claims of 1882 were paid out of the proceeds of the loan of 1885.

It may also be said that governments have not hesitated to press tort claims to payment even against governments which were in receivership or in default on their bonded indebtedness.<sup>69</sup>

*State succession.* In two other respects international law impinges on international loans. In the event of state succession, particularly partial succession, important legal issues arise which have been examined in two recent notable works, one by Professor Sack and one by Professor Feilchenfeld.<sup>70</sup> While there is a disposition on the part of some writers, survey-

In the post-war settlement priority appears to have been given to the tort claimants. The first charge against Germany under Article 297 of the Treaty of Versailles was to pay Allied claimants who had suffered from exceptional war measures in Germany. It may be added, however, that Allied creditors of German debtors under the Clearing Office settlements were also given priority over general reparations. It could be argued that these payments to Allied creditors were effected out of the proceeds of confiscated private property belonging to German nationals in the Allied countries. Whatever objection there may be, however, to this method of paying governmental debts, it remains true that persons suffering tort injuries were included in the first class of those to be reimbursed. It could also be said, however, that many of these persons suffering physical or financial injury sustained no legal wrong at all, but were victims of war, without valid claims recognized by international law. But the treaties accorded them a right of reimbursement not otherwise admissible.

In the case of the United States, the awards of the Mixed Claims Commission, United States and Germany, and of the Tripartite Claims Commission, United States and Hungary, are, under the Settlement of War Claims Act, to be paid in full, with interest at 5%. Preference is, however, given to death and personal injury claims, including the victims of the *Lusitania* disaster, who are to be paid at once in full, as are also the American owners of claims under \$100,000. The owners of claims above this amount are to receive \$100,000 at once and are then to be paid up to 80% out of payments to come from Germany, the balance of 20% to be liquidated gradually *pari passu* with the German owners of the 20% withheld by the Alien Property Custodian and of the 50% withheld from the German ship and patent claimants against the United States.

Claimants against Austria have already been paid in full out of the Special Deposit Account set up under the Settlement of War Claims Act. This account was supplied with the necessary \$350,000 or so by the Austrian Government from funds possessed in this country. The owners of bonds of the Austrian Government are not to be paid in full.

<sup>69</sup> As examples, there may be cited the *Don Pacifico* claim of Great Britain against Greece, 1849, during the period of Greek default, and the Cannon and Groce claims against Nicaragua in 1911, where the United States collected \$60,000 on behalf of the widows of these American citizens shot by Zelaya. In 1915 the Brazilian Ambassador, on behalf of the United States, exacted a payment from Mexico of 160,000 pesos for the murder by Zapatistas of John B. McManus. (For. Rel. 1915, p. 866.) In 1917, under an award of the King of Spain, Dec. 7, 1916, Honduras paid to Great Britain £1450 for an assault on three British subjects. (121 Brit. & For. St. Pap. 794.) In 1928 the Nanking Government paid to American and foreign citizens a considerable sum for the damages caused by the bombardment of Nanking. Italy secured a payment from Greece, under an award of the Council of Ambassadors, in 1921, for the killing of General Tellini in fixing the Albanian boundary. Even the Soviet Government is reported to have agreed to pay the claim of a Japanese woman killed and of a Japanese railway official injured in the bombardment of Manchuli, Manchuria, if Soviet forces were shown to have been responsible. (New York Times, Dec. 22, 1929.)

<sup>70</sup> Sack, *La succession aux dettes publiques d'états* (Paris, 1929); see also Sack, *Les effets des transformations des états sur leurs dettes publiques* (Paris, 1927), 2 vols., and book review

ing the practice of states, to question whether there is any obligation on a successor state to take over a part of the debt of a state to a portion of which it has succeeded, it is probable that there would have been less doubt on the subject had not the political vicissitudes of colonial possessions attracted undue attention. Their transfer or independence has not usually been accompanied by a willingness to assume part of the debt of the parent state. For that reason the assumption has been indulged that there was no legal obligation on a successor state in general. But had it been recalled that it never was expected that a colony bore any responsibility for the debt of the parent state, the phenomenon would have been given its appropriate significance, and it would have been observed that when European states have ceded portions of their national territory, it has been the general custom, with minor exceptions, of which Alsace-Lorraine is the most notable instance, to assume a share of the general debt of the ceding state. The real difficulty in the subject arises in establishing a basis upon which such an assumption of debt shall be made and also in determining what in fact is a local debt, which in principle, it is admitted, must be assumed.

*War.* The other question arises with respect to war. Unhappily the world seems still to be afflicted by that plague, largely because human beings associated in national groups seem not yet to have achieved the capacity and self-restraint to live and let live. Ambition for aggrandizement and domination seems either to disregard the cost or to believe that the end may be worth the price. The art of compromise becomes bogged in the quagmires of prestige. Legal formulas will not alone accomplish peace. But in the meantime the institution of war is one of the greatest deterrents to economic progress, and it has taken its toll of international loans, thus adding to the creditor's insecurity and the debtor's costs, to the distress of both. But until recently it had been regarded, for reasons of self-interest if not of morality, as an impregnable rule that the fact of war could in no degree interfere with the legal obligation, either to pay interest or principal. Interest has occasionally been untransmittable to the bondholders, citizens of enemy countries, during the continuance of the war, but it has never been suggested in modern times that the bondholders could lose their right to the interest or principal. The whole institution, which depends on good faith, would be wrecked by such a doctrine, which Alexander Hamilton penetratingly exposed, and the world would be driven back to primitive methods of exchange. Yet we have lived to see important countries since 1919 actually confiscate their national bonds held by citizens of ex-enemy states, thus defying one of the most fundamental principles of the capitalistic system. To this day these ex-enemy bondholders have, except to the trifling extent to which they have been reimbursed by their own government, been left without

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by Sack of Feilchenfeld (1932), 80 U. of Pa. Law Rev. 608. Feilchenfeld, Ernest H., *Public Debts and State Succession*, New York, Macmillan Co., 1931.

compensation. The confiscation of public loans in the hands of foreigners under any circumstances will impair the institution of international lending and will affect the credit and reputation of the confiscating countries. The precedent cannot be permitted to stand if the economic world that we know is to go on.

## XII. TENTATIVE CONCLUSIONS

From this survey, the following tentative conclusions may be ventured:

1. The state must continue to live. Settlements of a bankrupt state's liabilities must provide, expressly or implicitly, for enough revenue for the continuance of the state's essential functions, but the creditors may demand sacrifices on the part of the state in its expenditures and exercise some control over their administration.
2. Receivership expenses and kindred charges are given a first claim on revenues of the state.
3. Government salaries, wages, and pensions in arrears are frequently given a priority over other claims.
4. Trust funds administered by the state for quasi-public purposes, such as insurance, orphans' funds, special pension funds, etc., should be given a priority.
5. Tort claimants against the state who have reduced their claims by arbitration, or otherwise, to the just amount presently due must be and are usually paid off without reduction, though if conditions make it impossible to pay cash, these claims may be paid off in part and deferred in part over a period of time. This general rule is qualified to this extent, that claims may be reduced after being subjected to reinvestigation when in the hands of transferees who are speculators.
6. The lenders of new money loaned pursuant to a reorganization are usually given a priority in payment and security either when old loans are thereby discharged or when the financial condition of the country requires old secured creditors to surrender a part of their security or their previous preference in order to obtain new money for the state, or else the new lenders may obtain available security, notwithstanding the fact that the old bond creditors are obliged to accept a reduction in claim or security.
7. Secured bondholders possessing mortgages or pledges held by the lenders' agents are entitled to preferential treatment over all other bondholders not so secured as follows: their security must not be disturbed, even where the unsecured bondholders take a reduction in capital and/or interest rate and/or amortization rate, unless a general reorganization of the whole state debt is unavoidable, in which case their security may be disturbed, but they must be afforded preference as to terms of conversion and/or interest rate and/or amortization rate over unsecured bondholders. The security, rate of interest, issue price, period of amortization, and other conditions of the loan can be taken into consideration in fixing priority between



different bond issues, in the reorganization. The beneficiaries of assigned revenues are likewise protected against impairment of their security, except in cases of imperious necessity, and in that event their security entitles them to preferences over unsecured creditors in reorganization.

8. Certain domestic loans made by national banks of issue from the gold reserve or from funds designed for the protection of the national credit or currency may have priority over secured bonds.

9. In principle, domestic and foreign bondholders having the same type of bond and /or security therefor, are treated alike, and against such equality foreign protest is inadmissible. For economic or political reasons, a country may give preference in treatment to foreign bondholders.

10. All claims similar in character must in principle be treated alike regardless of nationality. This rule is subject to two possible qualifications: (a) where one state has expended or made special efforts to enforce its claims it has obtained preference for some claims—but this is not deemed good law, for there are several cases *contra*; (b) where a creditor state pays its own claims out of a fund belonging to the debtor in its possession, it apparently need not share this fund with other creditors.

11. Domestic creditors and others who may be paper creditors are, in the event of depreciation of the currency, in a worse position than the holders of obligations expressed in metallic currency.

12. There is much support in the municipal law of the leading countries concerning priorities in insolvency and bankruptcy, for the priorities in state insolvency above mentioned, and such analogies from the private law, especially of the insolvent state, have been employed in effecting reorganizations in insolvent states.

13. While governments will not interpose diplomatically in the event of mere default, they will interpose when security is improperly diverted from the rightful claimants.

14. The State Department has pressed tort claims and not contract claims. Bond claims especially have been refused diplomatic support and have even been dismissed before claims commissions as not within their jurisdiction, as were other "claims."

15. Tort claims have been pressed against states in default on their bonds, and arbitral commissions have made awards on tort claims during such period. These awards have been paid in full, though occasionally deferred in time.

16. The State Department's control over international claims of American citizens against foreign states enables it to prefer some claimants to others, for reasons of public policy. Its control over foreign loans contemplated by American bankers or citizens enables it to veto a loan deemed contrary to the national interest, *e.g.*, a loan to a country which has not settled claims of the United States, and probably also enables it to require bondholders not to interfere with the settlement of international claims by



private agreements with foreign governments contrary to the national interests and public policy of the United States.

17. States have a duty to assume a proportionate share of the general debt of states to a part of which they succeed.

18. The confiscation of public loans in the hands of bondholders, citizens of enemy states, is illegal and should be condemned as immoral and subversive of the existing economic order.

**THE PRESIDENT.** The discussion will be led by Mr. William K. Jackson, Vice-President and General Counsel of the United Fruit Company.

**MR. WILLIAM K. JACKSON** (Vice-President and General Counsel, United Fruit Company). The remarks which I may make in discussing the very able and comprehensive speech of Dr. Borchard will be limited territorially to Latin America, and will be procedural in nature rather than substantive, but I hope nevertheless practical. The volume of loans made in the last ten to fifteen years by the citizens of the United States to the nations of Latin America and their political subdivisions, aggregating about two billion dollars, justifies a separate discussion of these loans and their possible international consequences. This is particularly true when we realize that some eight hundred million dollars of these loans are now in default and, moreover, that upon the basis of present market prices of these Latin American loans, the American investor has suffered a depreciation of approximately from 50 to 95 per cent. of his original loan or investment. It is inevitable that the efforts of American investors, either by reason of their direct negotiations with the Governments of Latin America or through the indirect good offices of our State Department, will have repercussions of an important character in the international relations between the United States and these friendly governments to the south of us. The experience of our banking institutions and investors in the field of foreign loans is of comparatively short duration, and unless we carefully and sympathetically survey the economic and political conditions existing in our debtor nations, we shall probably make the mistakes of inexperience in approaching or seeking a solution of the existing difficulties. In fact, without in the slightest degree questioning the utmost good faith of those who in recent months have forced into the front lines of our newspapers a full discussion of the Latin American loans, yet it is true that these discussions, while intended for home consumption in the United States, have been misunderstood by some elements among our neighbors and have tended to produce a measure of instability in some governments which were coöperating whole-heartedly with the State Department and our investors in maintaining their loan obligations to us.

After all, international law represents more than anything else the development and acceptance of a higher type of ideals and conduct as between the nations of the world and their respective citizens. This growth, however consistently progressive from decade to decade, has had cataclysmic interrup-

tions, but the spirit of international law persists, and means or institutions for limiting and restricting these interruptions are being constantly devised. The fact that people with money in one country are willing to accept the promise or obligation of the existing government of another country to repay in the future the money they may lend, is proof of a growing belief in the inherent honesty and good faith of governments and their people. When an investor lends to an existing foreign government and accepts a promise of that government to repay principal and interest over a period of many years, he knows that that government's tenure in office is short and that the possibility of repayment taking place is dependent upon the good faith of the future governments of that country, including its legislative and administrative officials; in other words, he believes in the inherent honesty and stability of the people of the borrowing country. He may somewhat fortify this belief by imposing higher interest rates and somewhat stringent provisions as to assignment of revenues as security for his loan, but after all, he must believe in their good faith or he would not risk his money. However, changes in economic conditions have produced cataclysmic interference with the continuity of international loans, even as they have occurred in international peace. Therefore, the friends of international law must devise the means for the maintenance of the international good-will which makes international loans possible and prevent or soften the misunderstandings which may arise from a failure on the part of the debtor to meet his obligations to his creditor.

First, let us consider the problem as to future loans. There have been grievous errors both by our bankers and by borrowing governments in estimating the needs of these countries for borrowed capital; in determining the purposes to which such capital should be devoted, and in estimating the revenues and capacities of the governments or people to meet the obligations entailed by such loans. These preliminary errors contributed materially to the succeeding defaults which have had such disastrous results to our investors and to the borrowing governments. In periods of prosperity a large volume of capital seeking profitable investment may cause loans to be made upon dubious security, and for non-productive purposes; and even when made for apparently productive purposes, they create a form of artificial prosperity in the borrowing country resulting in large sums spent for wages and material, with enlarged buying power for both domestic and imported materials, and with an apparently increased public revenue with which to meet or discharge loan obligations. But when this flow of borrowed money into a country ceases, public improvements and expenditures decrease, laborers are thrown out of employment, and with diminished buying power imports are cut down and the increase in government revenues, so confidently heralded to bond buyers and relied upon, disappears. The erection of higher tariff barriers by the United States intended to stop this flow of foreign goods to our shores tended to restrict the volume and reduce the price of their exports. Other nations, consumers of the raw products of Latin

America, and lenders of money, quickly followed our example (or acted upon their own initiative), so that soon many of our Southern friends were wholly unable to carry on with what had become an oppressive foreign loan obligation. Despite drastic reduction in public revenues, their debt charges have not decreased. With revenues approximating pre-prosperous era levels, which were then inadequate for governmental needs, it is not surprising that defaults have occurred. We can best appreciate the position of those governments when we realize that the burden of foreign debts requires from 30 to 72 per cent. of their total national revenues. The responsibility for this situation is not wholly theirs, and we must exercise a tact and patience born of understanding. Economic pressure in Latin America so often results in dissatisfaction with the existing order of things that governments are overthrown, political disturbances occur and economic disorder prevails. This affects international peace and security. To the extent that international loans have been contributing causes and irritants, we should diligently search for remedies.

Preventative medicine is more palatable than curative drugs. If possible, some agency should be devised which could dispassionately survey the capital needs of prospective borrowers and the adequacy of the national resources to make the loans sound both for the borrower and the lender. This agency, functioning from year to year, would gradually accumulate statistical data of inestimable value, and the publication of this authoritative data would be of great value to the investor. The favorable opinion of this agency as to the soundness of a proposed loan might well come to be regarded as an essential prerequisite to a public offering. The proposal of Congressman Fish for the creation of a Federal agency is interesting and it may be sound, but I have not had occasion to study its legal aspects. Either some such official agency, or some unofficial agency constituted of men of the highest character and ability, is advisable. In this connection it is my understanding that Harvard University has recently created a department with the avowed purpose of collecting complete and thorough statistical data relating to the countries of Latin America. Inexperienced or greedy banking houses may make statements to the investing public with respect to a proposed loan and the ability of the borrower which are only half truths. A dishonest government, or one with little vision, may seek loans beyond the capacity of its government and people to spend judiciously or with whose interest and amortization requirements they cannot comply. Because of the unusually important aspects of loans to foreign governments, the intervention of some disinterested intermediary who can give true facts and an opinion based on proper perspective seems necessary. This Society might well take part in the organization of such an agency.

A more immediate and pressing problem arises out of existing defaults. It may be said that we should leave this problem to the banking houses who originated our loans with Latin America, and let them work out with the gov-

ernments involved the best method of making good their defaulted loans. This method of dealing with the matter has been found inadequate in the countries with longest lending experience, and I believe will prove equally so here. The number of banking institutions originating these loans is large, and oftentimes there are several originating houses for different loans to the same government. Some of these houses have ceased to exist since the loans were made. Some, or most of them, lack the trained personnel with a continuing contact and knowledge of the economic and political conditions controlling the capacity of the governments involved to meet their obligations. They may lack the financial resources or the willingness to carry on the extended negotiations often necessary to protect the bondholders. A small but well-trained and experienced permanent staff is more effective. It is true that in some instances specially constituted protective committees may function satisfactorily, but it is not safe to depend upon such committees.

The situation seems to call for an institution not unlike the British Corporation of Foreign Bondholders. I am not unmindful of the fact that already we have two agencies in the United States, the Institute of International Finance and the Foreign Securities Committee of the Investment Bankers Association. Both of these are of comparatively recent origin, and while their work has doubtless been satisfactory in so far as it goes, nevertheless, I feel that an institution should be organized with a broader, and perhaps more permanent, foundation. This problem has already received the attention of our State Department and a satisfactory solution may have already been worked out. This Society might well designate representatives to work with the State Department or with a legislative committee in seeking a solution.

I want to emphasize the importance of the machinery or agency devised to effect with the foreign governments the adjustments necessary in connection with defaulted loans. Dr. Borchard has discussed most comprehensively the principles of law which should guide the representatives of the bondholders in their negotiations. In one Central American case already two bondholders' protective committees are vying with each other in seeking bond deposits, and these rivalries are not creating a very favorable atmosphere in the country involved. Moreover, this situation is bound to complicate negotiations and to some extent jeopardize the interests of the bondholders.

The latest estimate of the Department of Commerce shows that our long-term investments in Latin America, about five and one-quarter billion dollars, exceeds slightly our similar investment in Europe, but there is this important difference. About two-thirds of the European investment is in the form of securities, while less than one-third of the Latin American investment is of that type, and the other two-thirds is a direct investment in properties. Any anti-foreign feeling that may be created by unfortunate or unreasonable demands by representatives of bondholders will have an un-

favorable reaction locally upon our investment in properties, which is twice as large as in bonds. Moreover, any increased taxation necessary to meet bond obligations will very probably fall heaviest on our property investments in these countries. These investments are generally in a type of property not owned by nationals of these countries, and are a very apparent and tangible object of taxation. Such taxation fits in admirably with the prevailing spirit of economic nationalism. Without the very best agency that experience can devise for handling the problem of foreign bond defaults, particularly in Latin America, or by reason of an intemperate or intolerant approach to the problem, our international good will may be diminished, and both our bond and private property investments jeopardized.

The PRESIDENT. The discussion will be continued by Ernst H. Feilchenfeld, Assistant Professor of Comparative Law, Harvard University.

Mr. ERNST H. FEILCHENFELD. The discussion so far has been devoted mostly to debts which states owe to individuals. This is probably the more interesting and more prominent problem. May I supplement the discussion by discussing briefly intergovernmental debts, and engage in a comparative discussion of reparations and inter-allied debts, both of which are owed by one government to another, or to others.

Comparisons between the two debts have, of course, frequently been made. Clearly, both are government debts. Clearly both have their origin in a war and are referred to as war debts. As to their differences, one line of distinction is obvious, although, as I shall try to show, it is not the line of distinction which is of the greatest legal interest. Reparations are debts which rest upon recognition of what I might call briefly alleged moral tort claims, while the inter-allied debts are debts contracted for value received. I shall not engage in a discussion of the merits of either of these debts, to ask whether one is actually based on a wrong, and whether the others are actually debts based on value received. From a legal point of view, it seems more important to engage in an analytical classification of these arguments. It is alleged that these debts have the same tainted origin and are bad in their effects. However, from a legal point of view, these points would seem to be important only for what is now almost history, namely, the original creation of these debts, and for their future in so far as they may become arguments in negotiations concerning future settlements. I do not think that these arguments concern the present legal status of these debts.

Reparations, it would seem, are at the top of a scale, the bottom of which is occupied by ordinary debts owed by one individual to another. If one individual owes a debt to another, or if a corporation owes a debt to other individuals, then we have what the lawyer would regard as the normal case. If default occurs, you can sue; if there are assets, you can attach them. It is customary to say that ordinary debts are, comparatively speaking, the safest debts. However, while it is true that a private debtor cannot himself



cancel his own debt, it is not true, as we have seen repeatedly in recent times, that private debts are not necessarily free from government interference, by one's own government or by a foreign government. One's own government or a foreign government may confiscate the debts or may declare a moratorium. Theoretically speaking, it may even be said that ordinary debts owed by one individual to an individual of the same state are the weakest debts, because they can be cancelled by their own government and no point of international law can be raised.—I am stating this in order to show that the difference in protection is not quite as absolute as is sometimes assumed.

The type of debt which Mr. Borchard discussed, the debt owed by a state to an individual, is normally not protected by the possibility of law-suits, but may be. The ordinary debt is normally protected by the possibility of law-suits, but this possibility, as well as attachment, may be temporarily excluded. I shall not engage in a full discussion of all the theories which come up with regard to debts owed by states to individuals, beyond saying that I agree with Mr. Borchard that these debts are not debts owed under international law. However, apart from this statement, no generalization is possible. It all depends upon the arrangements made between the parties. The parties may put the debt under the public law of the debtor country, or even under the private law of the creditor country. They may also put it, by the application of artful draftsmanship, under more protection of international law than usually exists. I think it is also theoretically possible that a situation may exist where a debt is not legally owed, and has only moral validity. I would agree with Mr. Borchard that this latter situation is not likely to exist in practice. Those who have studied loan agreements know how technical such agreements are, how frequently they are protected by mortgages, and wonder how those who adhere to the moral validity theory can explain a mortgage which is based on a right which is legally non-existent from the beginning. It is usually argued that these debts have another protection which is not of a legal character, namely, the loss of credit of the defaulting debtor country abroad. If a state does not pay, then it is argued the market will react unfavorably, and this will make for payment. I do not want to discuss the merits of this argument beyond saying that it has probably been overstressed at times. I am merely mentioning the argument in order to supplement the point discussed before.

Reparations are treaty debts. A treaty is an agreement under international law. If a state violates a treaty, it violates international law. If a state violates a provision of a treaty dealing with reparation, it follows that it violates international law. This is important for the following reason: If a state defaults on debts owed to individuals without repudiating them, then it is at least controversial whether an international delinquency has been committed. If, however, a state violates a promise contained in a reparation provision of a treaty, then international law has been violated.

What measures are applicable if a violation of the reparation provisions



of a treaty has occurred? Can the creditor state resort to reprisals in your own country? Can it resort to self-help? Can it avoid the treaty with the party on the other side? And, most important of all, are measures permitted under which the creditor state invades the country of the debtor? There exists, I think, little precedent on the application of sanctions to international law debts. In the Treaty of Versailles the point is not left to general rules of international law, but, both in the Versailles Treaty and in the Young Plan, is covered by special provisions. The Young Plan, if I remember correctly, speaks of the destruction of the plan. What does "destruction" mean? Is it identical with violation? Is it cancellation? Is it non-payment? Is it so-called malicious default? All these questions are very difficult to decide.

Generally speaking two safe statements may be made. (1) Security provisions may apply, and a treaty debt may remain in existence in every case of default. (2) Penal clauses could not work if there is a pardonable default based on impossibility or similar grounds. However, I am not inclined to assume absolute impossibility quite as easily as has been done in some recent discussions. From a legal point of view, absolute impossibility would only exist if the whole *genus*, all the money of the type which is owed, has disappeared; or, if there is a transfer clause, if enough foreign money is not available and can not be obtained. Recent experience, I think, has shown these two cases are rare. A practical discussion would hardly restrict pardonable default to a case of absolute impossibility. However, once we go beyond absolute impossibility, we leave the field where we deal with clear-cut facts and get into the field of speculation. What difficulties do we expect a debtor to overcome? To put it more popularly, how hard do we expect him to work? And, second, just what sacrifices do we expect him to make? I may add, so far as impossibility has come up in recent discussions, it has always been considered an absolute impossibility: if one payment is made on June 1, then it is expected that on November 1 no money will be left for payment.

In one sense, reparations are the strongest debts, because their enforcement is independent of the action of the debtor.

From a purely legal point of view, the second type, debts owed by a government to individuals, are undoubtedly the weakest type, because normally enforcement by law-suits is impossible. Mr. Borchard spoke of denial of justice as a ground for complaints based on violation of international law. I would rather restrict such ground to complaints of interference with the substance of debts. But I think the principle is becoming more and more agreed upon that the less serious measures do not create the right to take reprisals under international law.

May I now discuss inter-allied debts? If inter-allied debts were debts owed under international law, then they would differ from reparations merely because their sanctions are not specified in a treaty. This may be either an element of weakness or of strength, depending on whether treaty provisions limit or extend the sanctions available under general rules of international law.

However, I shall try to show that apparently inter-allied debts are not debts owed under international law. If they are not debts owed under international law, they are in a very peculiar position, because they are not, on the other hand, debts owed to individuals secured by moral protection through markets abroad.

The listing of inter-allied debts may be divided into three main stages,—the war loans, the post-war loans, and the various refunding agreements.

The Liberty Bonds Act of 1917 authorizes the extension of credit for the purchase of foreign obligations, and there is a provision (which was not embodied in the agreement), that these bonds must mature at a special time. The fact that an authorizing law exists does not, I think, point one way or another. The expressions used in the Act would indicate a commercial type of debt rather than a diplomatic type of debt, but I would not cite them for anything more.

More interesting, however, is the form of the obligation. There we find the terms such as "for value received," which again indicates the commercial nature of the debt. The documents are called "certificates," a term which would hardly occur if the parties intended to designate an obligation of a diplomatic type. Most interesting of all, this form contains a tax exemption clause to the effect that these debts are to be paid without deduction by the debtor for taxes, past, present and future. Such tax exemption clauses are not frequent. They are not frequent even in the case of debts owed to private creditors; but they are entirely absent, I think, in the numerous peace treaties of the past where diplomatic debts were created, reparations or others. The reason is obvious. Such a tax exemption clause would be unnecessary for a debt existing under international law. If a state promises money to another state under international law the debtor state cannot deduct any money under the pretext of taxation.

The next body of material is contained in the Victory Loan Acts of 1918. Some of them are interesting, by the way, because it is not at all clear whether some of these agreements were not actually *ultra vires* when they were made, but this point is of no interest now because of the refunding agreements. Most of these Victory Loan Act provisions are similar to the provisions of other documents containing provisions for sales. Among the objects sold there is even real estate abroad, and I think there is a strong presumption that real estate abroad is sold under the municipal law of the state where the real estate is situated. This indicates that the rest of the debt may have the same status.

In 1919 the Liquidation Commission was created. This commission, as a matter of fact, dealt with international law matters, but it also dealt with this disposition of property abroad. The most interesting document of this time for our problem is perhaps the so-called Sales Agreement of 1919. This agreement has all the earmarks of a common law contract, and, interestingly enough, is designated as a contract. On the other hand, this

agreement was ratified by France, and this fact may be cited in favor of the diplomatic nature of the relation. However, I think it is quite possible that the so-called ratification was resorted to in order to approve of a municipal law contract, not a treaty.

Some acts passed for European relief are not directly in point, but they are interesting because they indicate that in some cases, at least, the debts were not contracted with the United States Government, but with the United States Grain Corporation. Some of them are interesting because they provide for the issuing of notes which can be endorsed, and because they speak of conversions. Conversion, I think, is also a term which is rarely applied in treaties or other documents existing under international law.

There remains the question whether the situation has been changed by the refunding agreement.

I would not deny that the refunding agreements themselves were documents under international law. However, the refunding agreements do not, so far as I can see, change the character of the debts. They were not intended to. They were only intended to change conditions, and especially to fix the time for payment. Their main function is to provide for refunding. In other words, the obligation under international law, if any, is to issue a bond, but the debt is owed under the bond, and I think the bond, being related to the earlier documents, shares their character, and, like the earlier documents, does not represent an international law debt.

If the inter-allied debts are not international law debts, they are debts of the weakest character so far as sanctions are concerned, as distinguished from reparations, which are debts of the strongest character so far as sanctions are concerned. They are commercial debts for which, however, the ordinary channel of enforcement by lawsuit and attachment was quite clearly not anticipated.

The difference in the status of reparations and inter-allied debts is of considerable practical importance for the relations between Germany, the former Allies and the United States. As to Germany, there is at present a moratorium for reparations. However, there is also the Bruening statement that the Young Plan has broken down and payments have become definitely impossible. The question will arise in July whether this statement, if maintained, will not amount to a destruction of the Young Plan. The most obvious argument which may be advanced against this statement is that it is almost humanly impossible to anticipate paying capacity or absence of paying capacity for forty or fifty years to come; in other words, that the statement does not cover the whole period during which reparations are to run. However, on the other hand, it may still be safe, because it is based on paying capacity and comes from a government which has not taken the position in the past that reparations will not be paid at all, and therefore may be credited with having issued a *bona fide* statement on paying capacity which should not be regarded as a malicious destruction of the Young Plan.

Yet the issue arises—I do not want to treat it in this brief discussion, because it is a very serious question—what would happen if a different government gets into power in Germany which has taken the stand, even before it came into power, that these debts should not be paid, no matter whether paying capacity exists or not. In this case I would anticipate at least very serious legal discussions, and I think those who are not quite optimistic about development might contribute to clarify the issue before it comes up. Then, if any difficulty arises, the governments concerned would have at least an impression as to how their steps would be regarded by students of international law.

As to the Allies, I might just add here that there is no legal connection between inter-allied debts and reparations. The former are not secured debts; and there is nothing to indicate that they are payable only out of a certain income. If reparations should fall away, that fact of itself would not excuse any allied debtor. The question, of course, remains whether through the loss of reparation income the paying capacity of the allied debtor has been lowered so much that default is pardonable. In this connection—and this concerns the United States—the question of international law sanctions would come up if the inter-allied debts were international law obligations. Even in that case, if it were quite sure that sanctions would not actually be resorted to, the mere fact that they could be discussed as possible, and that their omission could be regarded as an act of grace by the United States, would be serious enough.

On the other hand, if, as I believe, they are not international law debts, but debts of a weaker type, then I think the position would be that no matter whether paying capacity were present or not the debt would still be owed, but no other legal consequence would result for there would be neither the sanctions of international law, nor the sanctions of municipal law afforded by an ordinary law suit (barring only the improbable case that these debts should be repudiated arbitrarily).

In other words, if certain developments occur, the Allies would probably have very serious rights against Germany, while the United States would have hardly any enforceable legal rights against the creditors of Germany.

I realize quite well, however, that matters in this field are not governed exclusively by law: even so, it seems important to contribute the legal point of view, which will form an important point in all negotiations which will take place.

The PRESIDENT. The discussion is open from the floor.

Mr. CRAWFORD M. BISHOP. I would like to suggest that Mr. Turlington is here and he has made a very thorough study of the question of indebtedness, and I think if we could have some remarks from him it would be very enlightening to us, especially on the subject of the debts of Latin-American countries, particularly Mexico, of which he recently made a very careful study.

The PRESIDENT. Does the gentleman accept the invitation?

Mr. TURLINGTON. Unfortunately, Mr. Chairman, Mr. Bishop did not tell me in advance that he was going to suggest that I make any remarks this evening. In view of the very thorough discussions that have preceded, I think I shall confine anything I have to say to but one remark, and that is something that has already been suggested by Mr. Jackson. It is something that I think becomes very clear to anyone watching a debt carefully over a period of a few years. That is, the contrast of interest, the conflict of interest that may often exist, that almost invariably exists, between the bondholders and the holders of other property. I do not have the figures at my disposal now, but I remember that there was a very large disproportion from the point of view of the bondholders between the interest of the American holders of Mexican bonds and that of the American holders of various other kinds of Mexican property. The same phenomenon is noticeable in regard to commerce: the commerce of the United States with some of the Latin-American countries is so much more important than the interest of any particular group of bondholders that the interests of our people engaged in trade must necessarily weigh the balance considerably down when the State Department comes to consider taking action which may be in the interest of one group, contrary to the interest of another.

That is in the way of elaboration of a point already suggested by Mr. Jackson, but since I am on my feet I may add one other thing that occurs to me as I go along, and that is in reference to a point made by Mr. Borchard. Mr. Borchard indicates, as I think with complete correctness,—and I would not venture to express a different opinion, I fear, if I had it, because I feel such a great respect for any opinion expressed by Mr. Borchard—Mr. Borchard says in effect, that default upon an international loan usually becomes a question of international law only when there occurs what we may consider a denial of justice. In other words, when a state that issues bonds has kept good faith, has done all that it can to meet its obligations, it is very difficult for anyone, any student of law, any government, to contend that there has been a breach of any obligation that may be said to be an obligation under international law. The point that occurs to me here is in connection with the famous circular of Lord Palmerston, I believe of about 1848. Lord Palmerston stated that if the question of the intervention of the British Government in behalf of bondholders was purely a question of international right or international law—he used the expression “international right,” there could be no question of the right of the British Government to intervene in behalf of any British subject whose interests of any kind in a foreign country had been subjected to unwarranted interference. Lord Palmerston made it a question of policy.

Then, it would seem, Mr. Chairman, to conclude my somewhat labored comment on the point so well made already by Mr. Borchard, that when we come to weigh the interests, the possible conflicting interests of Americans



who are bondholders and Americans who have other kinds of property, we may possibly follow very much the same policy that the British Government has followed. We may, as Mr. Borchard has suggested, be even more indulgent to the defaulting state, but at any rate, we shall have brought up essentially the question of not merely an injury to American interests, but a violation from our point of view of the principle, the right under international law.

MR. ARTHUR K. KUHN. Ladies and gentlemen: I think a little too much emphasis has been laid upon the difference between the character of international loans. I think we should recognize the underlying obligation of the state to pay its debts, whether those debts are due to another nation or whether those debts were incurred by a contract or a series of contracts made with the individuals of another nation. It may very well be that the means of enforcing the two different kinds of obligations will be different. States may negotiate directly, one with another, with regard to their debts, whereas the individual can neither directly negotiate nor can he take any judicial means to collect his debts against a foreign state, but the debt is no less sanctioned by the obligations of law, viewed in the wider acceptance of the term "law".

We discuss many obligations, especially before a society of international law, that have no court sanctions, that cannot be collected by means of an international sheriff, or by means analogous to the methods of a sheriff, and yet none of us would doubt the sanctity of those obligations. Nor is the proposition entirely academic. Fortunately we have had in the last decade, since the establishment of the Permanent Court of International Justice at The Hague, affirmation of the principle to which I refer, in several cases which have come before the court; notably, two cases which involved international loans of the character which we have been here discussing, and are analogous to the loans now held by many American citizens, under the obligation and promise to pay of countries of Latin-America and elsewhere.

I refer particularly to the case of the Serb-Croat-Slovene Loans held in France, and also to the Brazilian Loans held in France. Both cases were submitted to the Permanent Court under special agreement, and the question arose, and very properly, as to whether the court had jurisdiction to hear and determine a controversy which was essentially in the interest of private nationals, although presented by the Government of France, intervening in behalf of its nationals. The court decided, with a substantial majority, that under Articles 13 and 14 of the Covenant and Articles 34 and 38 of the Statute, the court had jurisdiction. The Court referred to previous cases, particularly the *Mavrommatis* and the *Upper Silesia* cases, in which it was decided that, by taking up a claim on behalf of its nationals before an international tribunal, a state is asserting its own right and the court had jurisdiction to decide it as an international controversy.

I think that gives confirmation to the proposition which I wish to ad-



vance, that essentially and at bottom, so far as an international claim is concerned, it makes no difference whether loans are held by the state or by its nationals, provided the state itself takes over the interest of its nationals.

One word more as to that. In the old Court of Exchequer in England, there were originally heard only cases in which the treasury, the exchequer, was directly interested, but in the course of history it was found that there were a great many cases of a private nature in which the treasury, the state, was indirectly interested, because if any individual is despoiled unrighteously of his property, he is unable to pay his imposts and duties to the state.

I think somewhat of the same theory applies in international relations. The state stands as the protector of the individual interests of its nationals, in order to obtain justice for the individual, but besides that, the state itself has a further and more direct interest. I shall not speak of it as being an entity separate and apart from the individuals composing it, because we have our distinguished President sitting on the platform, and he prefers to view the state as an aggregate of all the individuals composing it. Under either theory the state has a direct interest to see that its nationals are not despoiled of their property. A state must recognize its direct and indirect interests in the protection of its nationals by lending the good offices of friendly diplomacy in their behalf, not only for tort claims, but for contract claims as well. There have been defaults before this time. Defaults have been adjusted and resumptions of payment have been made when economic conditions improved. I think that not only by the honor and faith which are represented in international loans, but in the interests of the debtor states themselves, do we find the best guarantees. States are interested not only in maintaining their good name, but also in thus assuring protection to prospective investors. Nations which are still young and require capital for a long time to come in order to develop their natural resources, will be directly interested in taking up negotiations upon the basis of entire good faith.

Mr. A. H. FELLER. I should just like to say a word in addition to Mr. Feilchenfeld's discussion of the question of sanctions. It seems to me that in this whole subject of international loans and inter-governmental loans, the subject of sanctions, particularly in connection with the German reparations, will probably be the most important thing we have to face in the very near future. Dr. Feilchenfeld said that the refusal to pay reparations based upon a treaty would be a breach of the treaty, and might very well permit the creditor Powers to resort to the ordinary sanctions of international law.

I once very strongly supported that, but I did it for a client, and I have never been quite sure that that is so. However that may be, in the Versailles Treaty, curiously enough, provisions were made for sanctions, which would mean that the Versailles Treaty was more favorable to Germany in that connection than customary international law would have been. In other words, provision was made for the enforcement of the obligation to pay

reparations through a reparations commission, in which the collective action of the Allied Powers was necessary.

Now, under the Young Plan, that was apparently scrapped. Not in express terms, but the reparations commission is dropped. The creditor Powers were increased by the addition of Poland and, I believe, Czechoslovakia, and the curious provision was made that any of these creditor Powers might refer the question as to whether Germany intends to destroy the Young Plan in its entirety to the Permanent Court of International Justice. The first difficulty, of course, is as to the meaning of that very vague phrase "destroy the Young Plan in its entirety." It is curious too because it is different in the three languages in which the Young Plan is drawn up. It is "*Zereissen*" in German, and I forget exactly what it is in French.

We are faced with the first difficulty as to just how the Permanent Court could decide if that question was submitted to it. The second question is this: the Young Plan provides that if the World Court decides that Germany does intend to destroy the Young Plan in its entirety, the respective creditor Powers preserve their rights, and will then have to decide whether those rights are the rights which they had under customary international law, or whether they were the rights which they had under the Versailles Treaty. The second would seem to be absurd, because there is no machinery left such as the Versailles Treaty created.

The great danger, as I see it, is that Europe will let the question of the Young Plan go to sleep, that people will more or less not do anything for a time, in the hope that reparations will just be forgotten. Of course, the danger there is really very great, because if in ten years or so Germany should come back, one of the creditor Powers would always invoke this provision, and the mere fact that this provision may be invoked is, I think, and I think everyone will agree, something that would impair German credit and really prevent its recovery.

The next question, which I think might be discussed in connection with Dr. Feilchenfeld's position, is the question of priority among these three classes of debts which he mentioned, the so-called inter-governmental obligations, the international loans proper, and the debts among private individuals.

We are now witnessing, particularly in Central Europe, an increasing, one might almost say, nationalisation of the private debts of individuals through government interference in the form of moratoria which prevents the transfer of capital outside the country, and also, as for example in the so-called stand-still agreement between foreign creditors and German debtors, in which there was undoubtedly a considerable amount of government interference.

Another phenomenon I think is deserving of mention. When the German crisis came on, in the middle of July last year, there was an increasing

feeling that the German Government would take over a lot of the banks which had large foreign debts. In that case you would have the assumption of purely private debts by the German Government, and the question as to how you would rate the different priorities of debts complicated by the fact that some of the debts had been transferred into government obligations is really something which one almost hesitates to contemplate because of its complexity.

**THE PRESIDENT.** Is there any desire to discuss the question?

**PROFESSOR ELLERY C. STOWELL.** I do not wish to enter into a discussion of this very important question, but there is just one point that I do not like to see passed over, and that is in regard to the distinction made between the two classes of debts. Before I say what I am going to say, I would like to say that I have been one that felt we ought to have cancelled the debts that the Allies owed us, or, at least, a great portion of them. We have cancelled a considerable portion, but I thought we ought to cancel a great deal more. Not that they did not owe them, or not that they did not always collect debts of the same kind from everybody else when they had an opportunity, and not that they did not get large colonial possessions which we did not get, but because of the great principle of international coöperation. We were richer, stronger, and in a much better position, and the world would have been a much better place to live in if we had seen it that way and had done that noble act of cancelling the greater portion, perhaps all, of those debts. Now, we are likely to have to do it and not have carried out that generous, noble coöperative act; but if ever debt were honestly due, it was that latter class that were given to friendly allies on the assumption that they would be paid, as a matter of good faith. Treaties do not make international law. Treaties only evidence international law, and the great principle of international law is good faith, and good faith requires those states to pay those debts, particularly those which are the least formal, those which are most nearly based on a friendly relationship between the two. I dislike to see technicalities thrown in and drawn across the great principle of good faith. I think that ought to be kept very, very clear.

There is one other point that I do not think has been brought out in this debt matter, nor the question of the payment of the debt. Sometimes objection was made to the United States collecting its obligations, its debts, which arose from occupation. I think we could solve this difficulty if we were to apply the same principle which is applied in maritime law. If you put a mortgage on a ship, a bottomry bond, as it is called, and the ship goes on and gets into further trouble and you put on a second mortgage or bottomry bond, which bond gets paid first? It is the second bond, not the first mortgage, the way it is on a house or land. It is the second one which saves the ship for everybody. When America comes in with the money at the last and saves the ship for everybody, then her debt is privileged, and we should have the first privileged position to be paid. We did not take any colonies,

and for all of these reasons I think we are in the strongest moral and legal position.

Mr. BLEWETT LEE. Mr. President, ladies and gentlemen: I had not expected to say anything at all tonight, but I think the speakers, perhaps some of them, have been too much inclined to think that there is nothing that the foreign Powers can do about these debts. Of course, I have not the authentic information that our State Department enjoys, but I have observed that states which do not have the money to meet these obligations have had the money to make expensive military preparations, some of them of a somewhat secret character, with a view of getting back again territory which they have lost, and expenses, unnecessary from the standpoint of policing the countries themselves. I can understand very well how a foreign power, with the utmost indignation, would receive a suggestion that they spend the money in paying their debts instead of keeping their armies and navies and flying forces up to the highest efficiency, and I am quite prepared to believe that a good many foreign Powers are scared about the military situation in Europe. But that is a very different thing from saying that those countries are not able to pay, at least in part, some of those obligations which they have incurred.

Then, there is another suggestion which I want to make, which I think might inspire even more indignation, if anybody pays any attention to it at all. Huge colonial realms have come into the laps of our friends across the water. I refer particularly to Africa, in the first place. The great colonies of Germany have been taken from her and put, as it is called, under mandates but the ultimate disposition of those properties has not yet been made, and there are immense territorial assets which are practically being treated as if they belonged to some of our allied friends across the water.

In addition to that, when a man is not able to pay money, and he has property, that also is considered. That is only in a private obligation. But some of our friends across the water have enormous territorial possessions as yet entirely undeveloped. To illustrate what I mean, on the waters of the Caribbean there are huge domains almost in the condition they were at the time they were discovered. They would be acceptable from a debtor who has nothing else to pay. I refer to territories on the mainland as well as lands in the seas. I hope these things would never enter into a practical consideration, but we are not dealers with paupers; we are dealing with the great Powers of the world, and those of them which are not rich in money are rich in enormous territorial possessions which could be devoted to this purpose, if it were satisfactory to them and to us.

Unfortunately, mankind in the mass is not quite honest. To illustrate my meaning, there are states in this country which have defaulted their obligations many and many years ago, and which have never paid the slightest attention to the interest or the principal. They entered into situations, which if they had turned out fortunately, the States would have enjoyed the

benefit and nothing would have been said. They turned out very unfortunately. I cannot discuss the legal merits of this situation, but it is impossible that our foreign debtors should behave worse than some American States and municipalities have done.

The first question in the issue of municipal obligations in our country is, to ascertain, can this city, this county be made to pay? The practice of repudiation was once so common in this country, and such immense sums were lost, it was considered unsafe to lend money to any municipality until a most careful investigation had been made, to see if in case they repudiated, they could be made to repay the money.

My point is simply this; first this country is in no position to lecture foreign Powers on the subject of repudiation of obligations; in the second place, our good friends across the water are not as destitute as some of their local politicians might think, and, in the third place, if we could make a happy disposition of the disarmament problem, some of our most unfortunate brothers across the water might find themselves at least temporarily in funds.

The PRESIDENT. If there is no desire to continue the discussion, the Chair declares the meeting closed, to assemble tomorrow morning at 10 o'clock.

(Whereupon, at 10:30 o'clock p. m. an adjournment was taken until 10 o'clock a. m. of the following morning.)

## FIFTH SESSION

Saturday, April 30, 1932, 10 o'clock, a. m.

The Society met at 10 o'clock a. m., pursuant to adjournment.

The PRESIDENT. The meeting will come to order. Gentlemen, the program for this morning is a rather full one, the first item being the conclusion of the discussion on preceding papers. The Chair understands that to be a general discussion. Yesterday was devoted to three topics, one, in the morning, the treaty situation in the Far East, one in the afternoon, with various phases of the treaty situation in the Far East, and last night, international loans and international law. If there be no objection, the continued discussion will first be opened for the topic of Friday morning, the treaty situation in the Far East, the nature and interpretation of treaties, treaties made under duress. Are there any members present this morning who wish to continue the discussion of that topic?

Mr. HOLLIS R. BAILEY. Closely allied with the Far East is a situation which comes a little earlier on the program, as to the force of treaties obtained by duress, which means by force. We had one speaker on that topic who stated clearly that in his opinion treaties obtained by force were not necessarily forever binding. I am inclined to agree with him, because I believe that if a promise or a treaty is exacted by force it will be binding as long as the promisee has the force to enforce performance, and no longer.

If we go back in history to 1066, William the Conqueror received a visit from the last of the Saxon kings, and he made a treaty with him, which Harold signed, by which Harold agreed he would abdicate and let William take the rule of England. He said that was obtained by duress and he was not going to live up to it, but unfortunately William was stronger, and at the Battle of Hastings he showed he was stronger, and he showed Harold the treaty was in force and it has been in force ever since. But if William had made a mistake and Harold had had sufficient force to back up his contention that promises exacted by force were not binding, we might have had a different rule enunciated here yesterday, for I think it is true that a promise exacted by force is valid so long as the force exists which exacted it, and no longer.

Some years ago I had occasion to write an article for the Harvard Law Review as to jurisdiction, and I wrote to the effect that jurisdiction rests on force; that is, the court has jurisdiction in a case where it has the power to enforce its decrees, and not otherwise. That applies in a great many different situations. I think it applies in this case of treaty. I do not believe that a treaty which is exacted by force is necessarily forever binding. If the force which is behind it ceases, the treaty may not amount to much.

The PRESIDENT. Mr. Bailey, if the Chair may make a remark, and one



remark only; have you really put the question fairly before the meeting? The question is, in my humble opinion, not how long the treaty should last, but as to whether there is any treaty at all. There is not a meeting of minds in the form of contract, as we understand it, when one of the agents dominates and the other is not willing to consent. He does not consent, or he consents under duress. That I take it is the nub of the question, and you simply say that if the treaty has been made under duress it will only be binding as long as there is force. If it was not binding at first, how could it be made binding by force unless, of course, force generates agreements?

MR. BAILEY. That has always seemed to me a matter of words, not a matter of substance. You have to come down to force as the main thing in the whole matter, from beginning to end.

THE PRESIDENT. Of course, if you state that view, it is your personal view. I think a good many people differ from you, who believe that the agreement, not force, is the thing, and that force, after all, is an abuse in the world instead of a source of law and justice. However, that is a personal view. Is there any desire to continue the discussion on that topic?

PROFESSOR JAMES W. GARNER. I would like to reemphasize what I said the other day in connection with the doctrine of *rebus sic stantibus*. In my opinion, this question of the revision and readaptation of treaties to changed conditions is one of the most important questions in the domain of international relations today. I cannot think of any more important question. Conditions are changing so rapidly in the world today, the position of states, their international positions are changing, and treaties are constantly getting out of relation with the conditions under which they were negotiated and which exist at any particular time.

It seems to me there are two ways by which we could meet that situation. The first is a more frequent insertion in treaties, particularly treaties of strictly contractual character, of revisionary clauses, such as you will find in the treaty of 1909 between Germany, Italy and Switzerland, with regard to the St. Gothard Tunnel and such as you find in the Nationality Conventions of 1930.

THE PRESIDENT. Mr. Garner, as we are very informal this morning, and if I might interpose for a moment, don't you think what you have in mind might be met by concluding treaties for a limited period of time, so that the parties to the treaty may have the advantage of the experience, with a renewal clause, unless denounced?

PROFESSOR GARNER. Yes.

THE PRESIDENT. If a treaty be for a very short period of time, there is a tendency on the part of nations to continue the life of the treaty.

PROFESSOR PHILIP C. JESSUP. Might I interrupt to ask whether the President thinks that would be acceptable to the parties making these treaties? It would be very desirable, but could we have a peace treaty made for ten years?

The PRESIDENT. I think that is what was done in Paris. That is my answer—and I am a party to it.

Professor GARNER. There are some treaties which you could not very well limit to five or ten years.

The other avenue of approach which I had in mind was the development of the doctrine of *rebus sic stantibus*, under which treaties might be opened for reconsideration when the conditions under which they were concluded have undergone fundamental changes so that they are no longer equitable in their operation, when the burdens are on one party and the benefits on the other party. I realize the difficulty that there is no common judge to determine when the doctrine of *rebus sic stantibus* is applicable. It is exactly like the question of the validity of certain arbitral awards. Everybody admits that an arbitral award which is *ultra vires* by reason of the fact that it is in excess of the power of the arbiters, is null and void, but in the absence of a common judge to decide that fact, the dissatisfied party is the judge, which everyone will admit is a most unsatisfactory situation.

The point I want to raise is, and I offer it as a suggestion for what it may be worth, namely, that parties to the treaty might agree that when conditions have fundamentally changed so that a treaty no longer operates equally as between the parties, the doctrine of *rebus sic stantibus* might be applied and the dissatisfied party should have the right to bring before the Permanent Court of International Justice, or some arbitration tribunal, the question as to whether conditions have changed to his injury. In other words, I do not believe that the doctrine of *rebus sic stantibus* will ever be practicable, I do not see how it can be utilized, in the absence of a provision for a common judge. Why cannot parties to treaties agree to accept the decision of the Permanent Court of International Justice, or some *ad hoc* arbitration tribunal, as a forum for the determination of this question?

I repeat what I said the other day, namely, that in my opinion we are going to hear a great deal more about this thing of *rebus sic stantibus* in the future. We have heard a lot about it lately. It has been up again and again before international courts and arbitration tribunals and in diplomatic correspondence, and I believe it furnishes a way out of this difficulty, if you can only find a judge. That, I take it, is absolutely necessary.

Professor JESSUP. Mr. President, I would like to suggest that Professor Garner's point ties up with a suggestion which Professor Chamberlain made yesterday, namely, that this question of *rebus sic stantibus* is not entirely a question of termination, but largely a question of interpretation of a treaty, and I should like to recall to you that the phrase "*rebus sic stantibus*" is merely an abbreviation for the full phrase "*clausula rebus sic stantibus*." The doctrine really is that there is implicit in a treaty such a clause as Professor Garner would like to make explicit. The question of the application of the doctrine is, therefore, really one of interpretation, of the intent of the parties, as to whether they contemplated and implied the insertion in the

treaty of this clause, *clausula rebus sic stantibus*. Under many of the treaties which exist today, which provide for arbitration in case of a dispute as to the interpretation or application of the treaty, I think Professor Garner would be satisfied, although it might be more satisfactory explicitly to insert this *clausula rebus sic stantibus*, together with an arbitration clause.

Professor JESSE S. REEVES. Someone in the discussion referred to the danger of importing private law into the field of international law. Here is one conception which has suffered some sort of change by its being drawn out from private law into the field of international law. As I understand it, the *clausula rebus sic stantibus* doctrine is really involved more or less in the conception of contracts. It comes originally out of the private law of contracts. It is not exactly on all fours with it, but it is to some extent at least similar to the situation that presents a series of circumstances unforeseen at the time the contract was entered into, resulting in practical impossibility of performance. When it is imported into the interpretation of treaties, starting with the unfortunate parallel between treaties and contracts—for that is a very unfortunate parallel—we begin to get an enlargement of the conception.

I agree with Mr. Jessup thoroughly that the idea has been broadened by interpretation. In the last decades of the 19th century a considerable amount of the literature on the subject shows a gradual extension of the conception of the doctrine, so that what at first would seem to be a rather rigid thing widens out, increases its content, and, as applied to treaties, is setting up itself as a basis for setting aside the entire treaty. I think we set out with a comparatively narrow and rigid conception in private law, and widen it out when it is carried over into any other field. I may be wrong about it, but I think a good deal of the difficulty about the doctrine of *rebus sic stantibus* is due to a fundamental misapprehension of the analogy between contracts and treaties.

Professor QUINCY WRIGHT. I was a good deal impressed by what Mr. Chamberlain said yesterday also, and I draw a little different point from that which Mr. Jessup just now suggested. I understood Mr. Chamberlain to emphasize the very close relationship between the doctrine of *rebus sic stantibus* and the particular forum before which the doctrine was being urged. It seems to me that the doctrine *rebus sic stantibus* is a general term for covering the various grounds which one can urge before a tribunal or in a particular procedure for getting rid of a treaty.

Heretofore, so far as peaceful procedures are concerned, we have had the possibility of negotiating a new treaty. I should say that whatever arguments Secretary Hay urged before Lord Pauncefote in order to get rid of the Clayton-Bulwer Treaty were applications of the rule *rebus sic stantibus* with respect to the procedure of negotiation. He evidently advanced certain arguments which were adequate to the occasion that convinced Lord Pauncefote, and the Hay-Pauncefote Treaty was made, and the

other terminated. That is one kind of procedure which exists for terminating a treaty, and a certain kind of argument is appropriate to advance under those circumstances.

There is another procedure under Article 19 of the League of Nations Covenant. It is now possible for any member of the League which thinks that a treaty has become inapplicable or endangers peace, to put the question on the agenda, and that state is free to go before the Assembly of the League of Nations and advance any argument it sees fit to convince the other members of the Assembly that they should support a resolution to the effect that the treaty should be reconsidered because it has become inapplicable or because it endangers the peace. Doubtless the kinds of argument which might be advanced in the Assembly of the League of Nations would be quite various. That is a psychological question. How is a member of the Assembly to convince the representatives from Poland, Denmark, Sweden and other countries that they ought to vote for a resolution of this kind? It would be a political question. But I have no doubt that if one could get a unanimous vote in the Assembly, or substantially a unanimous vote, one would have advanced a long way toward getting rid of the treaty. That has not been done as yet, and we do not know exactly what the political effect would be, but I have no doubt it would have a great deal of influence in terminating a treaty.

Then there is the possibility of advancing arguments before the courts. Everyone recognizes that there are certain arguments which can be presented before a tribunal, arguments of a legal character, which will be persuasive upon the court. For instance, if one can prove that the other party has violated a treaty and has continually violated it, as a result of which the other party has denounced the treaty, I think that would be a very persuasive argument upon the court that the treaty is no longer applicable. One might show that the other party to the treaty has ceased to exist, that its sovereignty has been lost, that probably would be a very persuasive argument. If one can show that the treaty is no longer possible of execution that would be a persuasive argument. It seems to me that any of these arguments which can be advanced before the court and which are likely to persuade the court that conditions have arisen which have rendered the treaty no longer in effect, could be collected together and called the doctrine *rebus sic stantibus*.

I think it is very important that there should be a clear understanding of what are the appropriate arguments to advance before a court in order to show that a treaty is at an end. I do not think that such a legal procedure is enough. It is very important that there should be a political procedure such as that contemplated by Article 19 of the League Covenant, which will make it possible for states to advance a different type of argument, a more political type of argument, and thereby bring political pressure of a non-military character to facilitate the termination of the treaty.

Mr. FEILCHENFELD. It seems very questionable whether municipal law analogies are proper in the field of international law. It might be admitted, however, that a more developed system of law might afford lessons for a less developed system of law with regard to the lines which future development should follow.

Even if municipal law analogies are admitted, it seems to me that two points remain of importance. It should be ascertained whether municipal law contracts made under duress are void *ab initio*, or whether they are merely voidable in the sense that they are valid until they are voided by the injured party. Furthermore, as the state is an organization, it would not seem proper to apply analogy rules concerning duress against individuals. The proper rules to be considered are rules concerning duress against corporations. I believe that contracts made by a corporation cannot usually be voided because threat of force with regard to corporate interests has been used.

I was very much interested in Professor Quincy Wright's arguments, and would agree with most of them. However, I am somewhat skeptical as to whether the word *clausula* should be used in this connection. The real question, it seems to me, is not whether a state can get rid of a treaty with the consent of other states, but whether it can void the treaty without the consent of other states. Furthermore, it seems to me that the real question is less whether a treaty happened to come into existence under the influence of duress, but whether treaties having bad effects should remain in force.

It would seem desirable that ultimately some procedure would be created by which the obligation of undesirable treaties could be brought to an end no matter whether their origin was legitimate or not.

The PRESIDENT. Gentlemen, the Chair would like to call your attention to the fact that we are acting under the five-minute rule.

Professor JESSUP. I am sorry Mr. Feilchenfeld expressed some agreement with Mr. Wright, because I must disagree with both of them. It seems to me there are several elements which must be kept distinct. In the first place, there is the situation where there are two parties to a treaty, one of whom comes to the conclusion that the treaty no longer serves a useful purpose and is no longer suited to their mutual desires. In that case they enter into negotiations to conclude a new treaty. In the second place, there is the situation in which one party breaches the treaty, which does not have the effect, in my opinion, of terminating the treaty, but gives the other party the privilege of denouncing it. Another situation is that in which, through the application of a rule of law—for example, the doctrine of *rebus sic stantibus*, if that doctrine is a rule of law—the treaty is terminated by virtue of the application of that rule of law. In the fourth place, to come to the question of Article 19 of the Covenant, I would like very much to ask Mr. Wright to explain his authority for the proposition that the Assembly would



pass a resolution that a treaty is inapplicable. As I understand the precedents and the procedure under that—

Professor WRIGHT (interposing). May I just say that I did not say that?

Professor JESSUP. Yes, you did.

Professor WRIGHT. No, I did not. I said it was the privilege under the resolution of 1929 for any member to place on the agenda of the Assembly a claim to the effect that they regarded a treaty as inapplicable and dangerous. That is the wording of Article 19. I submit that is what I said. If I did not say it, that is what I intended to say.

Professor JESSUP. I believe that the precedents and procedure under Article 19 merely contemplate that if one member of the League raises this question before the Assembly, the Assembly may recommend to the parties a reconsideration of the treaty. In other words, they go back to the first situation I mentioned, and merely through the force of the opinion of the general international body assist the parties in negotiating a new treaty.

Mr. FRANCIS DEAK. Mr. Chairman, I would like to take issue with some points which Mr. Jessup and Mr. Wright raised in connection with Article 19 of the Covenant. I happened to be present at the meeting of the first committee when that resolution was passed, and so far as I know Article 19 remained merely a fiction and it does not mean anything. The procedure adopted is far from a practical one. If one nation would be inclined to ask for the application of Article 19, the question would be referred to the committee on agenda of the Assembly, where it would be undoubtedly killed. It would not even get on the agenda. The resolution of 1929 and the discussion which took place in 1930 and 1931 merely confused more the issue and made it more difficult to bring before the Assembly a question of reconsideration of a treaty.

Mr. LIANG. Mr. President—

The PRESIDENT. Mr. Liang, I wish to make the pertinent suggestion that inasmuch as you are a party at interest and have expressed your views at considerable length, that you keep within the five-minute rule.

Mr. LIANG. I am not speaking as a party in interest. I was an active participant in the League Assembly of 1929 when the question of Article 19 of the Covenant was raised. I am glad that Mr. Wright pointed out that Article 19 could serve a very useful purpose as a political argument, and that was exactly the argument the Chinese delegation put forth in 1929. The Chinese delegation raised the point that there were certain conditions, international conditions particularly, incorporated into treaties which constituted a danger to the future peace of the world, and requested the Assembly to appoint a commission to consider and advise about the application of Article 19 to those conditions. That argument was put forth as a warning, on the basis of the writing on the wall, which unfortunately has been vindicated by events. No legal argument was put forth. As a matter of fact, the argu-



ment the Chinese delegation made there was that if that article is not going to be a Dead Sea apple, then some action had to be taken in order to insure the future peace of the world. We know that law can never be divorced from politics and, as a matter of fact, I know there is such a thing as international law, but I do not know exactly what it is.

The PRESIDENT. This is the place to learn.

Mr. LIANG. To digress a little bit: last night some speaker made the statement that treaties do not make international law. I would say that even treaties do not necessarily make international law, while we, sitting here, might play a part in making international law. Returning to the question of *rebus sic stantibus*, as I said, there were certain political considerations which made it apparently obvious that the organization of such a commission was not feasible at that moment, and to temporize with the Chinese delegation, a resolution was passed. That is all it amounts to, and I do not think that resolution even established a future precedent for us. Consequently, no purpose will probably be served by arguing the way Professor Wright and Professor Jessup did about that resolution.

Professor MANLEY O. HUDSON. Mr. Liang's statement that opinions expressed in the course of this discussion might be cited by courts produces in me some misapprehension—or perhaps I should say some apprehension. I should be sorry indeed to think that some of the opinions I have heard expressed on this subject were going to be given that degree of authority or of prominence, for it seems to me the discussion has failed to take account of one or two very pertinent things.

A question was asked a moment ago which seems to me to go to the root of this matter. Surely any discussion of the termination of treaties involves first of all a classification of treaties. There may be some treaties to which you would want a certain principle to apply, and others to which it would be wholly inapplicable. I can not believe that there is any general principle which is to be applied to all treaties. The difficulty comes in our having used the word "treaty" to cover very many different kinds of instruments. I had great sympathy with Mr. MacNair's recent statement that the word "treaty" was the most overworked word in international law. I think we need sometimes to differentiate the different kinds of instruments which different states are making, and until there is some attempt made at classification, it seems idle to discuss the applicability of any general principle.

In the second place, I have not heard in this discussion any reference to the provision, which so far as I know is the only legislative provision involving the doctrine of *rebus sic stantibus* in existence. It is a provision in the Havana Convention on Treaties which seems to accept and incorporate the law of *rebus sic stantibus*. As far as I know, there has never been any case where the disposition of a treaty has depended upon the application of that doctrine.

In the third place, it seems to me important that distinction should be made between the various kinds of provisions in treaties, providing for their termination. On the whole I should think it would be a very useful thing if treaties were drafted so as to provide for their termination or for the necessity of their renewal, or for the possibility of their denunciation by one party, after a given period of time. My attention was called to that several years ago in connection with the form of arbitration treaty which the United States has been concluding during the past few years. Arbitration is a subject-matter where styles change very frequently. The original arbitration treaties of the United States, of the period 1907 to 1910, all included provisions that they should last for five years. That necessitated a renewal. In an arbitration treaty that is essential because the style is frequently changing. The present style of arbitration treaty of the United States contains no such provision, but provides for an indefinite continuance. I think that is a step backward. In all matters of that kind, where styles are changing, it is most important that the treaty itself should bear a limitation upon its own continuance.

I do not know that the problem of old treaties has caused a great deal of trouble, but I think the matter ought to be considered in reference to current treaties, and to provisions for termination in current treaties. But most of all, I should insist upon the classification of instruments, and I hope that we may get away from the overworking of the word "treaty."

Professor QUINCY WRIGHT. I want to say in regard to Mr. Feilchenfeld's statement that he seemed to deplore the fact that if one did not have any argument which would convince the Assembly that a treaty was inapplicable, and if one did not have any argument that would convince a court that a treaty was inapplicable, there was then no way in which one could get a treaty terminated. But, in my opinion, one ought not to get it terminated if his position was so weak as that. It is my opinion that, politically, if one can convince the members of the Assembly that a treaty ought to be terminated, it ought to be, and possibly it ought to require less than a unanimous vote; or if one can convince the World Court that it ought to be terminated, then it ought to be terminated. But if there is nobody but oneself and one's special friends that think it ought to be terminated, I think it ought to stand.

That brings me to Mr. Jessup's statement sharply distinguishing between the case of the application of the rule *rebus sic stantibus* and the case where a treaty is voidable because of non-execution by the other party. I do not think there is very much distinction between those cases. I do not believe that a state ought to be entitled to decide finally that the other party has violated a treaty, and therefore the treaty is at an end. We did that in 1798, I am perfectly aware, and it has been done by others, but it seems to me that it ought to belong to an international tribunal to determine whether the other party had violated the treaty. It is the commonest thing in the world for one party to a treaty to say the other party is violating it, and if

we are going to allow either one to get rid of a treaty the minute it thinks fit to make such a statement, the validity of treaties will not amount to very much. Therefore, it seems to me that a state should be entitled to present to an arbitral tribunal, or to the Permanent Court, the fact that it has denounced a treaty because in its opinion the other party has violated the treaty, but it remains for the tribunal to determine whether the facts are as alleged and, if so, whether they terminated the treaty. The situation would be the same with respect to any other facts, events or conditions which one party believes have operated to terminate a treaty.

Mr. HUNTER MILLER. I merely wanted to say a few words which were suggested somewhat by what Mr. Hudson said; without referring at all to present-day treaties or present-day conditions, it is a fact that a great many of the difficulties that have arisen have come from the absence of a proper clause of termination in treaties; that was the difficulty in 1798 with the treaties of 1778; although the Continental Congress had recognized that treaties should be drawn with a time limit, that was not always done, and when it was not done, it frequently gave rise to trouble; because in respect of certain classes of treaties, I think anyone would have to admit that it passes the wit of man to draw detailed clauses that can properly be perpetual; one only has to look back at some treaties which purported to be perpetual, or at least which had in them no clause of denunciation or termination, and read some of the lists of articles, for example, that were designated as contraband, or read some of the commercial clauses, such as those that were written in the early part of the 19th century or in the later 18th century.

The PRESIDENT. The Declaration of London is a good example.

Mr. MILLER. But I am not speaking of modern times, only of ancient times. Our treaty of 1795 with Spain is an example—which, it was contended, went on in force as against or in favor, if you please, against and in favor of the Latin American Republics; so without going into the legal side of the question, but taking merely the side of diplomacy, I suggest that the error in the drafting of treaties by the omission of any clause of termination has created a great deal of the discussion of the past and of the theories of the present.

Professor QUINCY WRIGHT. Was that an error in the Treaty of Versailles also?

Mr. MILLER. I would like to have the clause pointed out before I answer that question.

Professor WRIGHT. In not having a revision clause?

Mr. MILLER. Mr. Chairman, when one speaks of a treaty of several hundred pages, I submit that the question should be not framed generally; there are articles of revision and termination in the Treaty of Versailles in its various parts, and I confess I would not be able to give the same answer to Mr. Wright's question if he were speaking of the labor clauses, or perhaps of the clauses regarding—

Professor WRIGHT. Reparations and boundaries?

Mr. MILLER. Commercial conditions, some of which were limited to five and ten years.

The PRESIDENT. That question comes a little later.

Professor HUDSON. I wonder if Mr. Miller would agree with me that the Treaty of Versailles shows the necessity of the test of classification which I insisted upon. It contains certain provisions that are limited in duration. I suspect if one had all the facts before him, he would say today that fully two thirds of the Treaty of Versailles has been revised. I am sure that half of it has been either revised or has expired. In other words, there are provisions in the Treaty of Versailles, like the labor provisions, which you would not want to limit in duration of time. There are provisions, such as those Mr. Miller mentioned, about economic questions, which are limited to a definite period, five years in some cases, seven and ten years in other cases. There are even some territorial arrangements in the Treaty of Versailles which Mr. Miller is very familiar with, which are not permanent territorial arrangements for they are limited in time. Those relating to Kiel, for example.

Mr. MILLER. Yes, I believe with the possibility of extension, which was not exercised.

Professor HUDSON. In other words, I think the Treaty of Versailles did exactly the thing I have been insisting upon, and I believe you cannot discuss this subject apart from the topic with which Mr. Miller has dealt, namely, the inclusion of articles concerning termination, and apart from the classification upon which I insist and which I find in the Treaty of Versailles.

With reference to international legislation in general, however, some very interesting problems arise which have not been referred to in this discussion. Problems, for instance, of revision. I was present at the First International Labor Conference, which started the clause in all of the thirty-odd international labor conventions providing for the consideration of the problem of revision at least once in ten years. That provision has found place in all of the labor conventions. I felt that it was very necessary to foresee that legislation was not being attempted for all time to come, and to foresee the method by which there might be a revision. But the clause to that effect in the labor conventions has been very much misunderstood and it was very confusing at the Second International Labor Conference. Moreover, it has proved to be extremely difficult to get a revision of such an international convention. It was attempted a year or two ago unsuccessfully, and it is being attempted now by the Labor Conference which is in session this week in Geneva. But interests which find themselves entrenched by a provision in international legislation are always opposed to its revision.

The problems connected with the revision of treaties are problems which I think can be more fruitfully studied than the application of some general vague, hazy idea with a Latin name.

Secretary FINCH. Mr. Chairman, I wish merely to remark that while the proposal to improve our treaty negotiation and treaty drafting, by including provisions in regard to termination, would no doubt help in a great many cases, such a provision itself would also be subject to the human fallibilities that exist with reference to any other provision of a treaty. In the situation which we have been discussing, with particular reference to the Far East, the treaties which are the cause of the dispute themselves contain very definite provisions as to termination. The original treaties regarding Manchuria and the railways contained a definite date at which they should be terminated, that is, at the expiration of 25 years, and the question under discussion now is whether the extension of that date by another treaty is a valid extension. You cannot entirely solve your problem by such a very simple expedient as that suggested, namely, that all treaties have some provision with regard to termination.

Professor HUDSON. Just to finish off my remarks, I would like to propose for consideration this general principle, that all international engagements calling for continuing performance should be limited to 19 years. I take that period because Thomas Jefferson said it was the limit of possible foresight of man, in view of the fact that the majority of the adults living at one time will be dead in 19 years. I suggest this principle ought to be followed in treaty-making, that any international engagement which calls for continuing performance should be limited to 19 years.

Professor CLYDE EAGLETON. I would like to ask Mr. Hudson a question. Would that principle you apply here be applied as in the case of peace treaties? Would it also apply to treaties involving territorial situations?

Professor HUDSON. You remember I suggested that it be applied to an engagement which requires a continuing performance. I suppose a peace treaty does not require a continuing performance. I do not defend the classification made in the Treaty of Versailles. I would not like that to be misunderstood. Those parts of the treaty with which Mr. Miller dealt were very carefully limited in duration, and I am sure that classification was sound. There are other parts of the Treaty of Versailles where one may easily dispute the classification with respect to termination. But I would limit it to engagements calling for continuing performance. A treaty establishing a boundary, I take it, does not call for continuing performance once the boundary is established. It is very difficult under the Havana Convention to know whether there is any obligation continuing or not. I should think there was no obligation of continuing performance, even though there is an obligation of continuous recognition of the boundary established. Surely a treaty which merely declares the existence of a state of peace does not call for continuing performance.

Professor QUINCY WRIGHT. I think there is no question we ought to extend the use of the revision and denunciation clauses. I agree with Mr. Hudson.



Professor HUDSON. Don't agree with me about denunciation, because I haven't mentioned it.

Professor WRIGHT. Revision clauses then. I think there ought to be more denunciation clauses. I think the treaty itself ought to provide for the inevitable contingencies of the future. There are going to be changes in conditions, and the treaty itself ought to provide for that, whether by permitting denunciation or providing for a definite procedure of revision. It seems to me, however, that the subject we are discussing is the case of treaties where there is no such provision. Those are the cases where the doctrine *rebus sic stantibus* arises, and as I understand it, that was the thing we were dealing with. I can hardly contemplate the possibility of certain types of treaties, treaties which do not register a mutuality of interest at the time they are made—I can hardly contemplate the possibility of a denunciation or revision clause in such treaties. It is because of that fact that this question of termination of treaties is very closely related to the problem of duress in the making of treaties. I think if we adopt the principle that an obligation made under duress is never valid, then the whole question of *rebus sic stantibus* would be done away with, because it is entirely practicable in treaties that are not made under duress to have within the treaty a provision for denunciation or for revision. We know what the treaties are in which this question is important, treaties of peace; treaties unilaterally imposed, relating to reparations, to armaments, or to extraterritoriality. It is in regard to that type of treaty that adequate political and legal procedure is needed to recognize a state of affairs that brings the treaty to an end.

Professor HUDSON. Would you lump them all together?

Professor WRIGHT. I would lump the class of treaties made under duress. In other words, where at the time they were made there was no mutuality of interest. I think, if Mr. Hudson likes, that is a class of treaties, and if we are going to have that class of treaties, we have got to have some international institutions for adjusting them to future conditions, and I think essentially it is a problem of a political institution. I do not believe a boundary treaty, for instance, could easily be declared no longer effective by a court. It seems to me that the only solution for that kind of problem is to discover in some way what the consensus of world opinion is as to the desirability of the particular boundary, and when there is a strong consensus that a particular boundary is undesirable, political pressure ought to be brought to bring about a revision.

The PRESIDENT. Is there any further discussion by any person who has not expressed an opinion upon these matters? This session was for the continuation of discussion, meaning for those who had not previously aired their views. Is there any desire to continue the discussion of this phase of the question, either one or the other of the two phases, by members who have not expressed their views and who would like to express their views, before we pass on to the third item? The Chair hears no desire.



We shall pass to the third item of last evening, international loans and international law. Is there a desire on the part of any member present to express an opinion on that phase of our discussion? The Chair hears no expression of desire. The discussion is concluded.

We are now at the item "Miscellaneous discussion."

#### MISCELLANEOUS BUSINESS

Mr. CHARLES HENRY BUTLER. Mr. Chairman, before the Nomination Committee makes its report, I think it would be proper to call attention to the fact that a vacancy among our vice-presidents is to be filled. Since our last meeting this Society has lost one of its distinguished members, one of the members who has been on the Council since the beginning of this Society's life, and one of the active vice-presidents, Dr. David Jayne Hill—a man whose name is familiar to every one versed in diplomacy, international law, and history. Therefore, I ask this Society to endorse the action that was taken on Thursday by the Executive Council, in expressing regret for the loss we have sustained and extending the sympathy of the Society to the family of Dr. David Jayne Hill, our dearly beloved and much respected colleague.

(Mr. Butler's motion was duly seconded and carried, expressed by a rising vote of the members present.)

The PRESIDENT. Is there any further miscellaneous business?

I am really unwilling, ladies and gentlemen, to allow Mr. Butler's motion to pass without a personal word on this occasion. It had been my good fortune to meet Dr. Hill upon coming to Washington some 26 years ago, when our friendship began, the memory of which, and the fragrance of which, will last as long as I am a thing of flesh and blood. His services are spread upon the record and there is no necessity to dwell upon them. I would, however, call attention to one fact, that Dr. Hill was a friend of humankind; he was gentle, he was courteous, he was sympathetic, he was helpful, and his knowledge and his experience he held in trust for all those who might desire to profit by it.

In his death we have lost a public servant in the fullness of years, and in his passing our Society lost a wise counsellor and a friend to every member of this organization. I may not say more. I would be unwilling to say less.

Is there any further miscellaneous business? If there is no further miscellaneous business, the Chair declares the first item of this morning's session exhausted. We therefore pass now to the business meeting of the Society, the first item being the report of the Committee on Codification of International Law. The Chair recognizes Mr. Reeves.

#### REPORT OF THE COMMITTEE ON CODIFICATION OF INTERNATIONAL LAW

Professor JESSE S. REEVES. Mr. President, reporting for the standing Committee on the Codification of International Law, I think we may safely say that the past year has been one distinctly of progress. It is true that so

far as the continuation of the progressive codification of international law under the auspices of the League of Nations is concerned, no new steps have been taken, for under the resolutions of the Assembly of the League of Nations a year ago last September it would now seem that the initiative in resuming that work is committed to individual states, and so far no state has taken such an initiative.

Last year a representative group from this Society expressed to the Secretary of State the hope that the United States might respond affirmatively and sympathetically to further developments in codification on the part of the League of Nations, and that we are happy to see was done in the response made by the Secretary of State to the interrogatory of the League of Nations. Very properly it seems to me the Secretary of State suggested that future attempts at codification should be limited to a very small number of subjects.

The agenda for the coming Pan American Conference to be held at Montevideo, probably during the next year, has a promise of renewed activity and continuation of the work of progressive codification of international law in the Western Hemisphere, for upon the agenda for the Seventh Pan American Conference appear ten subjects for codification, and it is interesting to observe that three of those ten topics were the three topics which held the attention of the First Conference for the Codification of International Law held under the auspices of the League of Nations at the Hague last year.

But passing from this purely official evidence of continuous interest in the progressive codification of international law to unofficial assistance in that process, for it is a long process, I am happy to announce that this year sees the completion of the second phase in American unofficial codification, the compilation by a group, known as the Research in International Law, of draft conventions with comments thereon upon four topics which had previously been deemed ripe and suitable for codification.

This work so completed embraces draft conventions with comment upon the subject of diplomatic privileges and immunities; second, upon consuls and their functions; third, competence of courts, and fourth, piracy. This work of the Research in International Law ties into the activities of the American Society of International Law. Without exception the members of the standing committee which I have the honor to represent have been actively engaged in this work of the Harvard Research. The director of the Harvard Research, Professor Hudson, is of course a member of this committee.

These four works appear now as supplements to the *American Journal of International Law*, that to the April number of this *Journal*, which some of you have seen, and others will see when you return to your homes, contains the draft convention upon diplomatic privileges and immunities with comment, the draft convention on consuls with comment, and the supple-

ment to the July number will contain the draft convention on the competence of courts with comment, while the October supplement will contain the draft convention on piracy with comment, and an extended collection of piracy laws.

I might say that ultimately these four draft conventions with comments will be embraced in a volume on codification of international law, and I think I may be permitted to say that there is every indication that the work of the Research is not now ended, but thanks to the initiative and enterprise, the devotion, and, I might say, intelligent and enthusiastic persistence of the director, Professor Hudson, we have every indication that that work will be carried on, taking up additional topics for its work for the next year or the years to come. With this volume as Exhibit A of the interest of members of the American Society of International Law in the codification of international law, I think I may report progress in more than one way.

The PRESIDENT. The report will be received and considered as approved and filed.

The PRESIDENT. The next item is the report of the Committee on Honorary members. The Chair recognizes Mr. Stowell.

#### REPORT OF COMMITTEE ON HONORARY MEMBERS

Mr. President: The Committee on Selection of Honorary Members has carefully considered the names of foreign jurists conspicuous for their contribution to the science of international law, and in accordance with the mission confided to it by the American Society of International Law, has decided to nominate M. Charles Dupuis, member of the Institute of France and also a member of the *Institut de Droit International*.

M. Dupuis has long been a professor of public international law at the *École Libre des Sciences Politiques*. Successive generations of diplomats and jurists have benefitted from his wisdom and practical interpretation of the principles governing the relations of states. His work won the unqualified approval and admiration of the late Louis Renault, whom we first chose as an honorary member.

In recognition of his services he was chosen Director of the *École Libre des Sciences Politiques* to succeed Anatole LeRoy-Beaulieu. In 1899 he published an important work, *Le Droit de la Guerre Maritime*. Ten years later he gave us *Le Principe d'Équilibre et le Concert Européen de la Paix de Westphalie à L'Acte D'Algésiras*, and he has since published a number of other important studies in the field of international law and diplomacy.

M. Dupuis is a jurist and teacher upon whom we believe the American Society of International Law will wish to confer this signal honor.

ELLERY C. STOWELL,  
Chairman

The PRESIDENT. You have heard the recommendation of the Council. Is there a motion to approve the recommendation?

Mr. BUTLER. I move that the report be received, unanimously approved, and Mr. Dupuis be elected to honorary membership.

(The motion was seconded and carried.)

The PRESIDENT. The next item on the agenda is the report of the

Committee on Nominations. The Chair will call upon the chairman of that committee, Admiral Rodgers.

#### REPORT OF THE COMMITTEE ON NOMINATIONS

The Nominating Committee submits the following names to the Annual Meeting of the Society:

Honorary President: ELIHU ROOT

President: JAMES BROWN SCOTT

Honorary Vice Presidents:

PHILIP MARSHALL BROWN

CHARLES HENRY BUTLER

FREDERIC R. COUDERT

JAMES W. GARNER

CHARLES NOBLE GREGORY

CHARLES EVANS HUGHES

FRANK B. KELLOGG

JOHN BASSETT MOORE

JACKSON H. RALSTON

LEO S. ROWE

HENRY L. STIMSON

GEORGE GRAFTON WILSON

GEORGE W. WICKERSHAM

Vice Presidents:

CHANDLER P. ANDERSON

MANLEY O. HUDSON

JESSE S. REEVES

Executive Council to serve until 1935:

HOLLIS R. BAILEY, Boston

J. V. A. MACMURRAY, Baltimore

DENYS P. MYERS, Boston

HAROLD S. QUIGLEY, Minnesota

BESSIE RANDOLPH, Florida

IRVIN STEWART, Washington, D. C.

JOHN B. WHITTON, Princeton

GEORGE T. WEITZEL, Washington, D. C.

For the Committee:

W. L. RODGERS,

*Chairman*

The PRESIDENT. I will ask the Secretary, Mr. Finch, to take the Chair.

Secretary FINCH. Gentlemen, you have heard the report of the Committee on Nominations. What are your wishes with respect to it?

(Upon motion, duly seconded, the report of the Committee on Nominations was approved, and the Secretary instructed to cast a ballot of the Society for each of the gentlemen named for the positions indicated.)

Secretary FINCH. Gentlemen, I have cast the ballots as directed and the respective nominees are duly elected. I take pleasure in handing the gavel for another year to our President.

The PRESIDENT. Ladies and gentlemen, I desire to express the appreciation, I am quite sure, of the various persons whose names have been read and who in their persons have been elected to the various offices. In my own behalf I am pleased to serve the Society in any post or position in which they may desire to see me serve, and I am very grateful for this expression of renewed confidence.

Perhaps I may be permitted on this occasion to read a telegram which was handed to me at the opening of the session this morning.

TALLAHASSEE, FLORIDA

Greetings to you and to the Society: Warmest good wishes for an interesting and fruitful meeting.

(Signed) BESSIE C. RANDOLPH

The PRESIDENT. The next item is miscellaneous business. Is there any miscellaneous business?

Professor GARNER. May I say a few words about the matter of formulation of our annual programs? I should like to say it in the very best of spirit, Mr. President. I think there has been some little feeling that our programs have not been entirely successful, that we have not taken the matter of preparing our annual program quite seriously enough. I think the American Political Science Association has set a good example which we might very well follow in this respect. They elect their program committee at the annual meeting. That committee is selected with great care. It is a very representative committee. It gets to work at once on the program which is finished two or three months before the annual meeting. Now, we do not do it that way here, and I want to say frankly and, as I remarked, with the very best spirit, I think there is opportunity for improving our own method in this respect. I would like to suggest that we adopt some such system as that. It has happened that our program committee has been largely a local committee appointed a few weeks before our annual meeting, and while the chairman of that committee has done the very best he could, and I want to say particularly of our present chairman that he has given a great deal of time to the matter, and I think as a consequence we have had a very good program this year, but I think we might improve on this procedure by choosing a program committee at the annual meeting and urging upon it a little more consideration, a little more interest in the matter, and we might possibly get an improvement in our program.

I should like also to say in this connection that in my opinion we have about reached the time when we ought to try to find a more suitable room for our annual meetings. Anyone who has sat here the last two days knows how difficult it is to conduct proceedings in this very noisy room. We have been meeting here 26 years. Some of us feel a sort of sentimental attachment to this room and this place. I certainly do. But I feel, Mr. President, that we have come to the time when we ought to try to find a better place, a place where the President can be heard and where the speakers can be heard with more ease and more satisfaction. I merely want to throw that out as a suggestion which I think merits our serious consideration.

The PRESIDENT. If a remark would be appropriate, it would be that the recommendations which have been made will be given consideration. We have had some trying experiences with our meetings. For a few years

we met here and then we tried other places, and our experience has been that our very best meetings, the meetings best attended, have been those held in this hotel. However, I quite agree personally with Professor Garner, and I think that the committee on arrangements will consider this, not merely as a suggestion, but in the nature of a recommendation from the entire society, to secure quarters which will be more adequate and more personal and more intimate than is the room in this hotel.

Is there any further miscellaneous business?

Professor ELLERY C. STOWELL. I wish to express my appreciation for what the program committee has done. I think this is one of the most interesting sessions we have ever had. There is just one point I would like to make. Our papers claim to be 20-minute papers, but they are generally 35 to 40, and the courtesy of the members makes them refrain from objecting. It is on record as a precedent in our society, I believe, that when Mr. Root was in the chair he brought down his gavel and imposed the time limit upon a speaker so distinguished that he has since been awarded the Nobel Peace Prize. That had a very tonic effect on the whole society. We have lost a little of this Spartan spirit. I think it would be well to give notice in the future that, for the good of the Society, some of us had better rise and call attention to the lapse of 20 minutes, and the rest of the paper can be printed. I think that will make our meetings a little more snappy. I think we spread out a little too long and it makes it too late in the evening.

The PRESIDENT. Any further miscellaneous business?

Professor HERBERT WRIGHT. Among the several works which our distinguished President has issued during the past few years there is one in which he has endeavored to establish the Spanish origin of international law, and among the writers in this Spanish group is one Francisco de Vitoria, who composed his lectures just 400 years ago. If the President will pardon me, I would like to invite the members of the Society who are here present to attend a celebration in honor of Vitoria's fourth centenary, to be held at the Catholic University of America on Sunday evening at 8.15. My reason for mentioning it expressly to the Society is that the President of our Society is to be the principal speaker upon that occasion.

Secretary FINCH. Mr. President, I would like to make a brief statement on the practical subject of the arrangements for the annual meeting, which has had something to do with the choice of the present committee, and the committees in the past. We have the full facilities of this hotel and these accommodations for nothing, in consideration of having the dinner here with which we close our meetings, so that by subscribing to the dinner and coming in and eating a good dinner and listening to the excellent after-dinner speeches, we defray all of our expenses of holding the meetings in the hotel.

I have recognized, probably more than any other member of the Society, the drawback in meeting in this hotel or in any hotel. You cannot go to a



public place and expect to have absolute privacy. We have tried practically all the hotels in Washington and have come back to this place as the best hotel for our purposes. The alternative is to hire a hall not connected with a hotel. We may be able to do that, and then have our dinner wherever we want to have it, but we cannot have the best arrangements unless we are willing to go into the treasury of the Society to pay the expense. On one occasion we went to a very wonderful building here—I will not mention it—a semi-public building, and the cost of our meeting there for the electric lights and janitor service was \$100.

Mr. CHARLES HENRY BUTLER. I remember the incident the Secretary has referred to. The attendance was far less than what it was in this building.

Secretary FINCH. Yes. I should say that of all the places we have been we have had a better attendance here. I do not know why it is,—probably the location has something to do with it; but we have had a better attendance here at all our meetings than at any other place we have been.

The PRESIDENT. If there is no further miscellaneous business, and the Chair hears none, the Chair declares this item concluded, and the members of the Society are now ready for the meeting of the Executive Council.

(Whereupon, at 11.50 o'clock a. m., an adjournment was taken until 2 o'clock p. m.)

## SIXTH SESSION

Saturday, April 30, 1932, 2 o'clock p. m.

The Society convened at 2 o'clock p. m., Professor JAMES W. GARNER, Vice-President, presiding.

The CHAIRMAN. Ladies and gentlemen, the hour has more than arrived for the beginning of this session, which is to be devoted to the subject of international law of air navigation. In the absence of our President for the moment I have been asked to get the meeting started. Following the program, the first speaker is Professor George Grafton Wilson, of Harvard University, who will speak on "The International Law of Air Navigation."

### INTERNATIONAL LAW OF AIR NAVIGATION

BY GEORGE GRAFTON WILSON

*Professor of International Law, Harvard University*

The use of the air as a medium of support for directed motion is comparatively recent. The laws regulating the use of land and water for traffic and transportation have a long history. The use of the air for aviation has given rise to many questions both of fundamental and of an incidental character.

One of the fundamental bases upon which national title to land rests is that of discovery. That this title may be valid, it has been maintained that it be followed by occupation. Early explorations were not made by aircraft. Some late explorers have used this means of travel. The result has been that states have been faced with new problems. Discoveries by airmen in the region of the North Pole and in the region of the South Pole have given rise to difference of opinion as to the international consequences. Some writers have asserted that both areas are *res communes* or *res nullius* (Higgins) some that both may be acquired by occupation (Lindley); and others that one may be acquired and the other may not be acquired (Balch). Such questions have arisen as whether occasional visits by aircraft to an area previously discovered or exploitation from time to time of this area gives title. As these polar regions may become of increasing importance as aerial routes and for other reasons, it would seem desirable that international agreement be reached as to their status. Manifestly some of the early and accepted principles in regard to discovery and occupation will not apply.

There is naturally much difference of opinion in regard to the use of the air as this means of communication is new, but in the Air Commerce Act of 1926<sup>1</sup> it is stated that:

<sup>1</sup> 44 Stat., Pt. 2, 568.

The Congress hereby declares that the Government of the United States has, to the exclusion of all foreign nations, complete sovereignty of the airspace over the lands and waters of the United States, including the Canal Zone. Aircraft a part of the armed forces of any foreign nation shall not be navigated in the United States, including the Canal Zone, except in accordance with an authorization granted by the Secretary of State.

That the subject of air navigation is of importance for international law needs no argument. One needs only to glance at the growing bibliography upon many phases of aerial affairs. That there are wide differences of opinion as to the rules which should apply is similarly evident in the methods of approach to the subject.

Some of the rules of air navigation have been fairly acceptable from the start. These are such as are mutually advantageous to all aviators, *e.g.*, rules of the road determining movements of aircraft that they may be relatively safe as regards one another. The degree of care required of an aviator may, however, vary in respect to whether he is operating an aircraft for hire or in a private capacity. In this regard some states apply the same common law rules as apply to torts on land. Some states have no well defined rules.<sup>2</sup>

The Paris Convention of 1919, the Madrid Convention of 1926, and the Havana Convention of 1928, give evidence of the widespread interest in aviation and show how attempts to regulate the use of the air have progressed in multipartite agreements in the drafting of which nearly all the states of the world have participated. There are also many bilateral treaties which establish regional regulations.

In recent years committees have been appointed, conferences have been held and regulations have been proposed, and sometimes adopted, upon a multitude of subjects relating to air navigation. Many journals, books, and other publications upon aviation have appeared and are appearing. It may nevertheless be said that the number of topics still open is very large. The attempt to regulate air navigation by international agreement which was undertaken early in the century was interrupted by the World War and resumed at its close. The International Commission for Air Navigation, (I. C. A. N.), set up in 1922 as implementing the International Air Navigation Convention of October 13, 1919, has served a valuable purpose in establishing unification in essential details, such as identification marks, standards for airworthiness, intelligible documentation, guiding symbols, etc. When the Convention of 1919 was drawn up, there was a current opinion that a degree of peace and collective exercise of authority would follow the World War that has not in fact yet been realized. The Conference at Paris in 1929 proposed such further regulations as had been found desirable.

To a large degree the accepted rules in regard to navigation and com-

<sup>2</sup> Greunke v. North American Airways Co. (1930), 201 Wis. 565.

munication in general will not apply to the modern air service. Time and space, while not eliminated as factors in aërial navigation, play a very much reduced part as compared with that which they play in other means of transportation and communication, and the elimination of time and space seems to have been one of the goals for which so-called modern civilization has long sought. Air post is now regarded as essential and normal.

That states should regulate more strictly international aviation than other types of international commerce is natural, as the risks are greater and effective control of foreign aircraft more of a problem.

While the doctrine of innocent passage by aircraft over foreign territory has been widely advocated and cannot easily be controverted, the defining of the word "innocent" has been the subject of wide difference of opinion.

Such rules as that in regard to explosives,—“The carriage by aircraft of explosives and of arms and munitions of war is forbidden in international navigation,”—is general in bilateral and in multilateral treaties. Strictly speaking, such a rule might be regarded as too indefinite. It does not purport to prohibit the carriage of goods which might be in the category of contraband, though it does prohibit the carriage of arms and munitions of war which may be of less risk to the subjacent state than many articles of ordinary commerce, *i.e.*, the unrelated essential elements of an explosive may be harmless even when subject to concussion and may even be used for many other purposes, but the transport of these is not prohibited. Similarly, most arms, while often bulky, are no more dangerous in themselves to the subjacent states than any other equal bulk. In the time of peace, which is the time to which most of these treaties are by their terms restricted, it is exceedingly difficult to determine what are munitions of war. If the purpose of the article is to prohibit the carriage of articles that, because of their explosive or dangerous character, would cause undue risk to the subjacent states, manifestly a somewhat different category should be devised to include gases, etc.

There are many aspects of aviation which are not yet entirely covered by well devised regulation. The regulations covering aircraft on the surface of the water are not always identical with those covering watercraft. Complications may arise when aircraft are in motion at a short distance above the water and watercraft are in the immediate vicinity moving in opposite or in the same direction or passing.

In many respects it is natural that the law of aërial navigation should follow that of maritime navigation in the beginning. In matters in which there might be a strict parallel, such as required documentation, as registration, logbook, reports, etc., the laws may be the same for both sea and aircraft. The rules of the road, placing of lights on aircraft, airworthiness, speed, etc., must take into consideration the fact that the movement of the aircraft is not confined to a plane. Lighthouses for airways not merely have

different construction, but must be differently distributed from lights along waterways. Designation of ports of entry and matters concerned with entrance and clearance would have many analogies to maritime rules governing vessels.

Foreign civil aircraft under authorization of the Secretary of Commerce may navigate, subject to reciprocal privileges, in accord with the Act of Congress prescribing aerial rules. Civil airways may be designated by the Secretary of Commerce and the flight altitudes within navigable airspace may be prescribed.

Whether an airport in a neighborhood is a nuisance or a necessity is still debatable. The question of right of way through the air is not in all respects identical with that overland, particularly if aircraft must take off against the wind, and the wind may change its direction from time to time. One might even raise the question as to whether aircraft might with proper regard to the rights of land inhabitants entertain their passengers in flight by radio programs. Some seem to have good reasons for demanding that aircraft be required, as automobiles are required, to muffle their machinery.

It is essential to observe that the formulated rules in regard to aviation apply in the main to private civil aircraft, and many conventions mention only civil aircraft. Some conventions distinguish military aircraft from other categories, and restrict the movement without special permission of civil aircraft within foreign jurisdiction. Customs, police and postal aircraft have also been subject to special regulation or prohibitions.

The air navigation arrangement between the United States and Italy of October, 1931, contained articles granting certain reciprocal privileges to the civil aircraft of one within the jurisdiction of the other. The aircraft of each state must be certified as to airworthiness by its national authorities before entering the other states (Article 3). Unauthorized photography is prohibited (Art. 6). Aircraft of Italy may engage in the carriage of passengers and/or cargo between foreign ports and the United States, but not between ports of the United States, and aircraft have reciprocal privileges as regards Italy, but in each case of course conforming to national regulations (Art. 7). At about the same time agreements similar in some respects were entered into between other states.

Related to the exclusive jurisdiction of each state in the superjacent air is the degree of jurisdiction in the air above its territorial sea. If the right of innocent passage over the sea is to be accorded to a hydroplane on the surface, should this same right be denied to the same plane if it arises above the territorial sea? It was evident that the Commission of Jurists at The Hague in 1923 considering the revision of the rules of warfare, regarded it as desirable to apply more stringent rules to belligerent aircraft under their own power in neutral waters than to naval craft. These rules are more nearly analogous to the rules for belligerent troops entering neutral territory. The proposed Article 42 is as follows:

A neutral Government must use the means at its disposal to prevent the entry within its jurisdiction of belligerent military aircraft and to compel them to alight if they have entered such jurisdiction.

A neutral Government shall use the means at its disposal to intern any belligerent military aircraft which is within its jurisdiction after having alighted for any reason whatsoever, together with its crew and the passengers, if any.<sup>3</sup>

The Italian delegation had proposed that for the purpose of aerial jurisdiction above the sea the limits should be extended to ten miles. In the words of the official report

On principle it would seem that the jurisdiction in the airspace should be appurtenant to the territorial jurisdiction enjoyed beneath it, and that in the absence of a territorial jurisdiction beneath, there is no sound basis for jurisdiction in the air.<sup>4</sup>

In practice also states have determined that aircraft may be absolutely excluded from certain areas in time of peace. The Air Commerce Act of 1926 of the United States granted to the Secretary of Commerce extended regulatory powers. The neutrality proclamation of November 13, 1914, issued by the United States and relating to the Panama Canal Zone, contained a general prohibition both as to public and private aircraft.

Rule 15. Air craft of a belligerent Power, public or private, are forbidden to descend or arise within the jurisdiction of the United States at the Canal Zone, or to pass through the air spaces above the lands and waters within said jurisdiction.

Rule 16. For the purpose of these rules the Canal Zone includes the cities of Panama and Colon and the harbors adjacent to the said cities.<sup>5</sup>

By Executive Order, No. 5047, the President, February 18, 1929, declared "the Panama Canal Zone including the 'three mile limit' to be a military airspace reservation." The increasing use of aircraft will demand new rules to meet new conditions.

It is anticipated that seadromes or floating islands will be essential to the full development of international aviation. These floating islands in the high sea serving as ports of call for aircraft may be located at convenient points in the oceans and high seas. It is contemplated that there may be either private or public seadromes, but they would necessarily be under state or international control. Being in the high sea, the service must be available to any aircraft without distinction on account of nationality. The location of such seadromes should also be with international approval, because upon the high sea, though regional needs may properly be given weight. In time of war, seadromes permitted on the high sea by states in time of peace should not be allowed to be used for the military or strategic

<sup>3</sup> 1924 Naval War College, International Law Documents, 133.

<sup>4</sup> *Ibid.*, 152.

<sup>5</sup> 1916 Naval War College, International Law Topics, 99.



advantage of either belligerent; consequently their construction and location would naturally be with the view to the maximum service to international aviation.

President JAMES BROWN SCOTT (who had resumed the Chair). The discussion will be led by Colonel Clement L. Bouvé, American Agent, Mixed Claims Commissions, United States and Mexico.

Col. CLEMENT L. BOUVÉ (American Agent, Mixed Claims Commissions, United States and Mexico). In the Paris Convention of 1919 and in the Havana Convention of 1928 it was recognized that the complete and exclusive sovereignty of every state over the airspace superincumbent upon its territory should not in practice be so exercised as to prevent the innocent passage of aircraft in time of peace. It was also recognized in these conventions that the freedom of innocent passage must be regulated under conditions based primarily on considerations of the physical and political welfare of the states over whose territory such passage occurs. It is my purpose to lay before you very briefly the conditions laid down in these conventions with respect to innocent passage.

The Paris Convention provides in its second article that "each contracting State undertakes in time of peace to accord freedom of innocent passage above its territory to the aircraft of the other contracting State provided that the conditions laid down in the present Convention are observed." Article IV of the Havana Convention contains the precise provision above quoted, the word "aircraft" being preceded by the word "private."

The conventions have one fundamental purpose: to enable aircraft to engage in international air navigation. In order to bring this about it was necessary to lay down principles which should announce (a) what a state was bound to do in order to qualify its aircraft to enter the aerial jurisdiction of a foreign state, (b) the rules of conduct to be observed by its aircraft when in the aerial territory of that foreign state.

The Paris Convention provides for the institution of a commission known as the International Commission for Air Navigation, to supervise and amend regulations for the management and control of aircraft and air traffic, which includes, for instance, the marking of aircraft, the issuance of certificates of airworthiness, certificates of competency, and licenses with respect to pilots and navigators, rules for air traffic, the preparation of international aeronautical maps, and the collection and dissemination of all essential information. The Havana Convention does not provide for a body exercising any such powers.

As to the nationality, certification and registration of aircraft, the Paris Convention provides:

Article 6. Aircraft possess the nationality of the State on the register of which they are entered . . .

Article 7. No aircraft shall be entered on the register of one of the contracting States unless it belongs wholly to the nationals of such State.

Article 8. An aircraft cannot be validly registered in more than one State.

Articles 6 and 8 are repeated in Article VII of the Havana Convention. It does not contain the provision that no aircraft can be entered on the registry of one state unless it belongs wholly to the nationals of that state. That aircraft can not, without registration, participate in international flight is established by Article 10 of the Paris Convention, which provides that all aircraft engaged in international air navigation shall bear their registration marks. That states are bound to register all of their national aircraft which are to participate in international flight is made manifest from the above provision, as well as from that of Article 9 to the effect that the contracting states will effect a monthly exchange of registration and cancellations of registration which have been entered on their official registers during the preceding months. Furthermore, Article 9 provides that every aircraft engaged in international navigation shall be provided with a certificate of registration.

The above requirements with respect to registration are found in Articles VII, X, XI and XII of the Havana Convention. Its Article VIII provides that "the registration of aircraft referred to in the preceding article shall be made in accordance with the laws and special provisions of each contracting state."

As to certificates of airworthiness, competency and licenses, the Paris Convention provides:

Article 11. Every aircraft engaged in international navigation shall . . . be provided with a certificate of airworthiness issued or rendered valid by the State whose nationality it possesses.

The Havana Convention provides that the certificate of competency issued to the pilots of the issuing state shall set out that the individual in question is competent not only with respect to the requirements of his state, but with respect to the traffic rules of the state to be flown over. Also that the certificates of airworthiness issued by one state shall show that the aircraft complies with the requirements of airworthiness of the state to be flown over. While the contracting states affirm the principle that each shall engage in international air traffic without being subjected to the licensing system of any other, they reserve the right to refuse under certain conditions to recognize certificates of airworthiness which have been issued.

Both conventions, I should note at this point, deal primarily with private aircraft as distinguished from aircraft which, on account of their public nature, must be regarded as instrumentalities of the state, such as military, customs, postal, police aircraft. Article 30 of the Paris Convention provides that the aircraft above designated shall be "deemed" to be "State aircraft."

However, postal aircraft are to be "treated" as private aircraft, and as such shall be subject to the provisions of the convention.

Aircraft are deemed to be "military" aircraft when "commanded by a person in military service detailed for the purpose." Flight by military aircraft over foreign states is absolutely prohibited, as is landing upon foreign territory, without special authorization from the foreign government in question. When such authorization is granted, military aircraft enjoy "in principle," and in the absence of special stipulation, the privileges customarily accorded to foreign ships of war. It is stated, however, that no right to enjoy such privileges is "acquired" by foreign military aircraft "by reason of" being summoned to land by the authorities of the subjacent state, or by reason of being forced to land.

The treaty provision in question should not, I believe, be read to mean that a military aircraft which is forced to land, or is ordered to land, cannot, because of these reasons, claim the right to privileges customarily accorded to foreign ships of war. It is thought that it goes no further than to announce in effect that an order directed by a subjacent state to foreign military aircraft to land shall not be construed as a *special authorization* for it to enter or to be in the territory of that state; and that, in regard to a forced landing, *force majeure* cannot take the place of such *special authorization*.

Under Article III of the Havana Convention, the definition of state aircraft is, except for the addition of the words "and naval aircraft" the same as in the Paris Convention. No attempt is made to state the conditions under which military, naval, customs or police aircraft may fly over a foreign state.

Article 33 of the Paris Convention provides that the conditions under which foreign police and customs aircraft may cross the aerial frontier between two states will be a matter for special arrangement. But it is provided in that article that in no case shall such craft be entitled to the privileges accorded military aircraft when entering foreign jurisdiction under special authorization. The right of the state flown over to order foreign customs and police aircraft to land is inherent in the sovereignty of a state over all persons and things within its jurisdiction. Hence foreign customs and police aircraft to which the enjoyment of the freedom of innocent passage is not accorded would, unless entering under some special arrangement between the states affected, be legally bound to obey an order to land. If entering under a special authority, the obligation to land would depend upon the terms of the special agreement.

Under Article 36 of the Paris Convention the states are left free to conclude as amongst themselves special protocols in respect to customs, police and postal aircraft flight, to be communicated to the International Commission for Air Navigation. The Havana Convention in Article XIX provides for the exemption, at the option of the subjacent state, of postal aircraft from the obligation of landing at airdromes designated as ports of entry, and for

authority for them to proceed to certain airdromes, being careful to follow the normal air routes. The international flight of postal aircraft is recognized as the proper subject of special agreements between the postal administrations of the states which have entered into separate treaties on the subject of air navigation.

As to the carriage of arms, explosives and munitions of war, Article 26 of the Paris Convention provides that the carriage by aircraft of explosives and of arms and munitions of war is forbidden in international navigation. The necessity of such a prohibition, having in view the security and welfare of the states flown over, is too obvious to require comment. The prohibition is repeated in Article XV of the Havana Convention.

Both the Paris and the Havana Conventions make it perfectly plain from the wording of the conditions under which the privilege of innocent passage may be exercised by the parties to these agreements that the granting of the privilege cannot be read as in any way departing from the recognition of the principle that foreign persons and property in the air above the territorial confines of a state are as fully subject to its jurisdiction as they or it would be if present on its lands or waters.

It is obvious that so complicated an interstate system of regulation as that involved in international air commerce cannot be put into effective operation without a constant exchange of all information bearing on the subject. Such intercommunication is essential from the standpoint of the state flown over, as a means of self-preservation. It is essential from the standpoint of the state to which the aircraft belongs, in order to enable it to meet the conditions under which such aircraft may enjoy the privilege of flight in the aerial territory of a sister state.

The necessity for this exchange of information between states in the premises is recognized in Article 34 of the Paris Convention, notably that subdivision which imposes on the International Commission for Air Navigation the duty "to collect and communicate to the contracting States information of every kind concerning international air navigation." Under the Havana Convention, in the absence of a body to carry out the duties or vested with the authority of the International Commission for Air Navigation, the obligation to disseminate the information regarding registrations and cancellations thereof, regulations governing the rating of aircraft as to airworthiness, regulations governing the issuance of certificates of competency, or the carriage by aircraft of photographic apparatus, restrictions as to the carriage of certain articles, regulations as to air ports of entry or departure, and air routes devolves upon the states themselves, with the assistance of the Pan American Union.

The above conditions, which I have so sketchily discussed, appear to me to be the fundamental conditions for the enjoyment of innocent passage, and I offer them for your consideration as such.

At the present stage of development of aerial navigation, the freedom

of innocent passage by foreign aircraft over the territory of a state is enjoyed only by virtue of treaty provisions to that effect. It may be, as that eminent authority Henry-Couannier has suggested, that with the passage of time the principle of exclusive air sovereignty may in times of peace, at least, become a dead letter; that innocent passage may cease to be regarded as a mere privilege for states to enjoy at the sufferance of their sister states, and that the doctrine announcing it will develop into a rule of "freedom of aerial circulation subject to limitations in the nature of measures of security to be agreed upon by the different states and to be as uniform as possible."

The PRESIDENT. The discussion will be further continued by Mr. Blewett Lee, of the New York Bar.

Mr. BLEWETT LEE. I saw in the papers day before yesterday that a Canadian pilot had flown from Montreal to Havana, about the same distance, he thought, he would have to fly to get across the ocean on a flight he expects to make this summer. If that pilot took the safest route, avoiding the mountains, going down through New York and New Jersey, hugging the coast where forced landings could be made, I suppose that he was guilty of an offense against the laws of the United States; and if he made a forced landing, that he would have to answer for the consequences in any damages as if he were a person engaged in an unlawful act, and to pay his fine besides, because under the Air Commerce Act no foreign aircraft may be used in either interstate or intrastate commerce, and it has been held that the passage of goods from Canada through the United States to the Gulf of Mexico for further transportation is interstate commerce.

Now, my thesis is this: that if that Canadian pilot flew at a height beyond the effective range of aircraft guns, he was not bound to get the permission of the United States, and this, if you will pardon my saying so, in spite of the somewhat ignoble law we have made on the subject, which cannot be applicable to him, because he was not in the territory of the United States. I think everyone concedes that the territory of the United States does not reach the stars or the moon, but that it stops somewhere above.

I want to illustrate further. It is expected in July that the Junker Company in Germany will launch an airplane which it is proposed to fly at a height of 50,000 feet above the ground, and is expected perhaps to reach a speed of 500 miles per hour. If the hopes of the constructors of this plane, and I believe the French are making a similar one, are realized, a man could cross the ocean between two meals. We do not know much yet about the stratosphere, but it is supposed that the air is still up there, that you are above the fogs and clouds and the storms, and that the rate of speed from the same power will be three times as fast as it is at the sea level.

Let us imagine, if you please, that this Canadian flier had such a machine, and he flew up where you not only could not possibly shoot him, but



you could not hear him, and you could not even see him, and that in the space of a few hours he passed from Montreal to Havana. It seems to me the idea that he is guilty of an offense against the laws of the United States and subject to fine if he should have the bad luck to make a forced landing, is contrary to any sound principle of international law, and just as the English and the Portuguese and the Spanish and the Dutch had their time when they each undertook to monopolize the high seas, and ultimately the sea proved too strong for them, we, moving faster now, may yet see the time when the air, or at least the stratosphere, will prove too much for the strength of even the great powers down at the other end of Pennsylvania Avenue.

I think that the present idea of carrying sovereignty to the stars, so to speak, is a bad business from a jurist's standpoint, and to follow it is to be just like one who studies under a bad piano player. The more nearly he follows his teacher, the worse it will be when a good piano teacher is reached at last. When we make a false start, the longer we follow along that line, the worse it will be when we have to correct it.

What analogy should we follow in this matter? It has been briefly considered here. Personally, I would think that the analogy of the ship is still the best for the aircraft, and my reason for that is this: they are being made bigger and bigger. They are now in size at least larger than many ships. Take the case of Eckner's Zeppelin, which went around the world. There is a larger one in this country now, and a still larger one is building abroad. I confess I find nothing as near like the thing as the analogy of a ship on the high seas.

It has been argued that if we drop anything out of an airship the power of gravity will bring it down. I suppose its rate of speed stops increasing after a while. There is some such idea taught now, I believe. But my whole point is this: the danger of things dropping from a ship in the air is not different in nature from the danger of derelicts afloat on the high seas. I suppose that a water-logged lumber ship is more dangerous than an airship. There are very serious dangers that are created by ships on the high seas, such as wrecks and collisions, yet that does not justify a marginal state in forbidding the use of the high seas.

An effort is being made, much more in Europe than here, to make larger use of transportation by air. The question has come up of the limit of liability, and I am much interested to see that the doctrine favored or recommended there is that it shall be limited to the value of the ship, security being given before flying, so that it can be realized upon. That is our old friend of the admiralty law, and our still older friend of the wrongdoing slave that the owner could give up under the Roman law,—turn the slave over to the injured party to do with the slave as he chose. The convenience of that analogy is more and more important, it seems to me, and is more and more worthy to be studied.

To one of the great objections to the theory of unlimited sovereignty I



will now call attention. It is true that you can make the laws between any two nations anything you please by treaty, and by treaty it can be agreed that there shall be unlimited sovereignty over the air. You can work out the problem on that notion, and also provide that there shall be a right of innocent passage. But in this country we have by law stripped the air-man of the right of innocent passage, so that he is very helpless unless he can cover himself with the mantle of international law.

Returning to my point, the great objection to the theory of unlimited sovereignty of the air is that the theory can be and is profoundly abused. It can be and is used to give a monopoly to local people. In the United States we have a beautiful example of the march of a new industry. First, the clever, strong men in the beginning looked after Washington and got a law that no foreigner should engage in the business at all, that the competition of other people all over the world, our late allies and who-not, should be shut out completely. Their citizens cannot fly here at all. In the second place, we come to the next step; the gentlemen who are engaged in the air business very soon discover competition keeps down the profit of the business. They get together and either divide up the territory or buy each other out, and you reach the next stage; that to each airport only one air carrier will come. It will turn out exactly like the coastal shipping arrangements we have. If I go down to a port on the Atlantic Coast and I want to go to Boston, New York, or wherever on the Coast I want to go, only one line will serve me.

Please understand, I do not denounce monopoly, if the government will only keep its hand on the monopoly and keep the charges down to what are legitimate. There are times when perhaps it would be the very best thing to do. But that is not the way we operate at all. We allow a monopoly to be created, and then the monopoly has quite a free hand. I blame nobody. I just point out that it so happens. That is liable to happen in all of the nations accepting that theory, and that theory has been accepted, following our example, from here to Cape Horn.

It is all very nice as long as you only go to the coast of a state. You can probably arrange to go there. But suppose you want to use your capital in the great enterprise of penetrating the country, as has been done in Colombia, to the great advantage of everybody concerned. Suppose that we want to put our capital and our skill at the service of Brazil or the Argentine or any of the great countries south of us, and to carry the skill of our men and the enterprise of our business to the very heart of the country? Why, we simply cannot go. They read our statute law to us and they get treaties on international law, and they can say "We regret exceedingly, but you have taught us to believe that this is the law" and we cannot fly there at all. The interests of the human race and the future of mankind require that those flying at a height beyond the effective range of cannon should have their freedom of passage, just as they have it on the high seas.

We are witnessing, ladies and gentlemen, one of the great disappointments of the human race. It was expected that after this great art originated and developed amongst us, every sky should be a sea and every city a port. Why not? Because the clever and powerful men in each country find it to their interest to put all the business in their private corrals. If they do so, it will be only what they have done with most other industries. We see this coming and we do not denounce it, because we are quite accustomed to it. But it is a great misfortune, I think, in this particular case. To illustrate, the little towns and cities in the country are building airports, those poor communities that are already taxed out of their boots, so to speak. Each raises some more money and builds an airport. They have this glorious vision, though hitherto inaccessible to ships and far from the sea, that they are now going to be accessible to the whole world. Are they? On the contrary, under the laws at Washington and the acts of those who are vested with the privileges from those laws, these disappointed people will be visited by only one carrier, and probably by that carrier only if he gets a contract to carry the mail. I am sorry for the people that spend their money to create airports, which will be futile and helpless because of the legislation here in Washington.

I see my time is about up, and as I am afraid since you get me so interested I will talk all afternoon, I will just say what a pleasure it is to be able to serve this cause to such extent as I can.

The PRESIDENT: Ladies and gentlemen, the subject is open to the floor under the five-minute rule. Mr. Colegrove.

Professor KENNETH W. COLEGROVE: May I be permitted to make a few observations with reference to the excellent paper of Mr. Bouvé, which made a comparison between the Paris Convention of 1919 and the Havana Convention of 1928? I regret that Mr. Bouvé did not go further and point out another pertinent comparison between these two conventions that has a connection with innocent passage.

Regarding the regulation of innocent passage, the Paris Convention of 1919 has pursued the best technique of international treaty-making, whereas the Havana Convention has not followed this technique. The technique is this: the treaty should lay down general rules, general principles, which are to be applied by the proper administrative agents. Treaties should not be burdened with a large amount of detail that may change from time to time. If the treaty is burdened with such detail, it soon becomes obsolete. In air navigation, the improvements are so great that in order to keep pace with mechanical inventions it is necessary constantly to make amendments in the regulations. What is airworthiness, for instance? What should be the examination for a pilot's license? The conditions quickly change from month to month, from year to year. The convention of 1919 contains annexes; and to these annexes are relegated all details of regulation, such as

the requirements for certificates of airworthiness and pilots' licenses. The annexes may be amended annually or more frequently by a simple procedure without disturbing the treaty itself.

The Paris Convention provided for a commission, commonly called the C. I. N. A., to which Mr. Bouvé has referred. The states signatory to the treaty send their delegates to the meetings of the commission in the various capitals of Europe. Each year or oftener, the commission examines the annexes of the treaty, which may be changed by a three-fourths majority vote of the experts there representing their governments. This provision enables the treaty to keep abreast of the times. A similar arrangement is entirely lacking in the Havana Convention. There is no commission for revision. An exchange of information under the Havana Convention can be made through the Pan American Union. But the Pan American Union cannot serve, and certainly would not be the proper body to serve, for the amendment of regulations, which should have been relegated to an annex of the treaty and entrusted to a commission of experts for periodic revision.

Professor JAMES W. GARNER. I want to endorse very heartily what Mr. Lee has said, particularly in regard to this theory of the absolute sovereignty of the subjacent state over the airspace above it. I suppose Mr. Lee and I are probably the only two persons here who take that view of the matter. I have been advocating it ever since I began the study of this subject, and if he and I are the only ones who take this view, I am not ashamed of it.

Somehow my simple mind revolts against the idea that sovereignty can be rightly claimed over a region and over the things in that region when it cannot be exercised physically. I cannot reconcile my notion to the idea of sovereignty over places and things where it cannot be exercised. I quite agree with Mr. Lee when he says that when an aviator flies from Canada over the United States without stopping, flies at great height, and flies in a way that cannot possibly disturb the people or the things on the surface below, the United States has no valid claim to assert a right of control over that aviator. I would say the same thing with regard to the American aviator who flies in the same way across British Columbia to Alaska.

The only reason why we claim control over the aviator in that case, the only reason such a claim can be defended, would be on the ground of the necessity of protecting the people and the things on the earth below. Well, if that be true and permission be given to fly over a territory, how can that protection be exercised? Suppose the aviator falls? Suppose his airship falls from a point very high in the airspace? Manifestly there will be nobody left when he strikes the ground below to exercise control over. Moreover, there will be no property left to attach or to confiscate. Then I say how can the control be exercised?

Now, Mr. Chairman, frankly I regret, I cannot help but regret, that when, after a thousand years of hoping and dreaming, science has given us

the means for navigating the air, the states below should immediately claim, and get that claim recognized, the right to prevent the use of the air for the purpose of navigation. I think the declaration in the Paris Convention of the right of subjacent states to forbid passage through their airspaces is fundamentally wrong. As Mr. Lee has pointed out, I do not believe anybody can say that the danger from dropping airplanes or other objects is still considerable; in fact it is so remote that it is not worth considering.

He referred to this monopoly which our Air Commerce Act of 1926 asserts for our own nationals to navigate the airspace of the United States. I regret that. I think it is setting a very bad example to other countries. Mexico has followed it. We will be the sufferer. I think Germany and Austria and Switzerland and Yugoslavia and other countries which have proclaimed the freedom of the air have set the sort of example which the states of the world ought to follow, instead of the principle of monopoly for national aviators.

I am sorry the United States has not ratified the Paris Convention. About thirty countries of the world have ratified it. Instead of that, we have ratified the Pan American Convention, which has been ratified by only four very small Latin American countries. As Professor Colegrove has so very well shown, the Pan American Convention is nothing but a makeshift. It does not establish any uniformity of regulation with regard to certain matters, such as certificate of airworthiness, signals, and the like. And yet, my friends, that is the best we have got.

Now, everyone knows why we have not ratified the Paris Convention. It is not because we have any intrinsic objection to it, but because it is tainted by its connection with the League of Nations. The International Air Convention is theoretically under the direction of the League of Nations, although actually it is not, and so long as it has this theoretical connection with the League, we cannot ratify it, or at least we think we cannot.

So, I would say again that I think Mr. Lee's thesis is a sound one. I think it is based on our own interests; it is based on practical considerations affecting the great industry of international air navigation. While I realize very fully that we possibly cannot turn back the tide since most of the nations have accepted the sovereignty theory, I shall never abandon the view that I have advocated, namely, that it is fundamentally wrong.

MR. ARTHUR K. KUHN. To me the abstract theories of sovereignty in the air are of less importance than the practical use of acknowledged or alleged sovereignty in the air. I was one of those, and my position at the present time is still the same, who believe that it is impossible to measure territorial sovereignty horizontally as well as laterally. You will get into too many difficulties which the law of nature makes it almost impossible to solve. The primal difficulty was indicated this afternoon by Professor Wilson when he pointed out that we cannot change the laws of gravity, and

that whatever goes up may very well come down. All states are interested in seeing to it that what goes up is not *likely* to come down, at least not prematurely.

Now, there is a compromise to accomplish the result desired both by Mr. Lee and by Professor Garner, and that is that the states of the world should be reasonable in the exercise of their claimed sovereign powers in the air. They should not assume to make the art of flying impossible by the exercise of sovereignty in the air beyond the requirements of protection. They should exercise such powers so that flying in the air by foreign aircraft and aviators may be safely carried on for the mutual benefit of all.

Indeed, it seems to me that compromises might well be made all along the line. Mr. Lee spoke about the analogy to navigation of ships and of limiting the liability of owners of aircraft to the value of the airship when they shall have been wrecked upon subjacent soil. The analogy to my mind is not quite correct by reason of the fact that we know that ships of the sea frequently have considerable value after the wreck. I should say that in the majority of cases there is not a total loss, and the salvage gives those who have been injured something to compensate them for their loss.

A proposal has been made in authoritative quarters, which has my warm support. It represents a compromise view, namely, that there shall be a money limit, a minimum limit, so that the owner or operator shall have a liability not over a fixed sum, nor be allowed to limit liability below that sum. A spot of grease may be all that is left from the fall of an aircraft from a distance of 50,000 feet, which height was stated to us this afternoon to be within the realms of the possible. The air carriers, the companies that have invested great sums of money in this new enterprise of aerial navigation, are all claiming that they are overregulated and unreasonably regulated, and that particularly international flying is being made more and more unprofitable. International coöperation is essential, whatever be the theoretical principle as to sovereignty in the air. I say let us get back to the principle of sanity.

Major ARCHIBALD KING. I came to this meeting, Mr. President, not with the faintest idea of being anything more than a humble member of the Society listening to those who have given much more study to the subject than I, but there are one or two things as to which possibly what little military education I have had may have brought some considerations to my mind which may not occur to some others.

Military men distinguish between effective range of a gun and extreme range of a gun. The suggestion has been made that the sovereignty of a nation may be limited overhead to the range of a gun. That suggests to me at once several questions. Does the speaker refer to the effective range or the extreme range?

Mr. BLEWETT LEE. Effective range.

Major KING. Effective range. Very well. What is the effective



range of a gun is, of course, a matter of opinion. What is its extreme range is susceptible of exact statement.

Then, the question is, what kind of a gun? Presumably the speaker meant an anti-aircraft gun, one that in practice would be used to keep off aircraft, but there are other guns that would fire much higher. When the Big Bertha startled the world on the 21st of March, 1918, by firing on Paris, nobody dreamed that any gun could be fired from such a distance or that the trajectory of any gun could reach to such an altitude. The only reason that the Big Bertha could fire so far was because during the higher part of its trajectory the flight of its projectile was so high that it was where the air was extremely rarefied, and while I do not remember at this moment just what that height was, my impression is it was considerably above any height at which aircraft navigation is practicable, except when equipped with oxygen tanks or other special equipment. So, if we adopt the highest possible height of any projectile, you will make your limit an impracticable one for preserving any territory for air navigation.

I am entirely unready at this moment or at any time to solve this difficult problem. I simply rose to my feet to suggest some of the practical difficulties that the plan of having the range of a gun taken as the limit of a nation's jurisdiction would be sure to bring forward. I cannot help thinking that if some horizontal plane has to be taken as the limit of a nation's jurisdiction, it would be far better to have a hard and fast limit of so many feet, or so many meters, above ground. I think the historical development of the national jurisdiction over the seas from the shores of the marginal states affords a helpful analogy. As I have read, the original limitation was the range of a gun, and the range of a gun at that time was a marine league, or three miles. As we all know, the range of heavy guns is now much greater. But the limit is still set at a marine league. So, while I am by no means sure but that that would raise practical difficulties of determining the altitude of an aircraft at any particular moment, I think as a practical matter a definite altitude limitation of so many feet or meters would work better than the range of a gun.

If you go back a little further, to the reason for all this, the reason for it, I apprehend, as was stated by one of the speakers, is that no nation ought to have jurisdiction further than it can actually control the air. It is stated by military men who have studied the subject much more than I, that the best defense against hostile aircraft is not a gun of any kind, but your own aircraft, rising from your own territory. So, if you are going to take as your test, that a nation has jurisdiction over such space in the air as it can potentially control, potentially it can control as much space with its own aircraft as any foreign nation's aircraft can fly over.

I thank you for your attention, and I have risen, as I say, simply to suggest some practical difficulties which occur to me.

The PRESIDENT. Is there any desire for further discussion?



Secretary FINCH. There is very little that I feel I can contribute to a discussion of the scientific aspects of this subject, but there is a matter of general consideration which I think is worth mentioning. It is largely a matter of policy which I think may be affected by what the nations decide in these early stages of this rapidly developing science. Certainly I can not, and I do not believe anybody else can, foresee the development that this wonderful science of aërial navigation may reach within a few years, but I have in mind the analogy of another means of transportation which has had an equally rapid development, I think too rapid a development for the people not engaged in it, and that is the automobile.

The automobile has been developed within comparatively recent years, and it has now reached the point where it is not only a means of great convenience and of great necessity, but it is also a means of great destruction of human life. I have had a feeling, in watching this development, that we were too inclined in the beginning, when this was a new industry, to lend it too much encouragement, and to allow these machines to be manufactured and used almost without restriction. It is a great deal easier to start your restrictions in the beginning than to allow any science or industry to develop and then try to place restrictions upon it.

If air navigation should develop to any considerable extent in any way comparable with the development of transportation by automobile on land, it may be a very serious problem to control the airways just as it is a difficult problem now to control our arteries of transportation on land. Of course, I recognize there is a great difference between the two, but I wish to urge the general caution that the nation should be very careful not to give up its right to keep the control of this developing science at every stage in order to be in a position to place any necessary safeguards on it as the science develops.

There is another feature of the subject which may have been mentioned in the papers just read, but I regret I did not hear them all; and that is the question of national regulation as well as international regulation. If you allow the freedom of the air internationally, how are you going to draw the line between that freedom and regulation within the country? If you allow foreign airships to navigate freely over your territory without any restrictions of any kind, how are you going to apply restrictions to your own national airships? Will you discriminate against them? Will you allow a Canadian line of airships to go back and forth over our territory to Mexico without any restrictions and at the same time put restrictions upon airships that may attempt to fly within our own national borders? And in our own country you have a further complication in the question of State jurisdiction of airships within the States.

So, without assuming to have any technical knowledge on the subject, I think as a general proposition it is the duty of the nations to keep within their own control the subject of regulation of this potential instrument of danger as well as of great benefit to the human race.

Professor GEORGE GRAFTON WILSON. May I say just one word in regard to both these theories? Finally these resolve into this: There must be regulation. Both theories admit that. Whether the sovereignty is in the subjacent state or whether there is no sovereignty, it is admitted that there must be regulation. The problem then comes, is it easier to begin to put on restrictions, or to begin to grant privileges? If the sovereignty is in the subjacent state, then the flying over that state will be determined by that state, and it will be an international privilege. If it is the reverse, the subjacent state must begin to put on restrictions and the obligation is upon the state to prove the necessity of the restrictions. The amount of international friction is always far less in granting privileges than in denying them.

Mr. DENYS P. MYERS. Seeing you in the chair, Mr. President, reminded me that between 20 and 25 years ago there was a very extensive study of this subject by the *Comité Juridique Internationale de l'Aviation*. Paul Fauchille, I think, was the moving spirit, and there were international groups, an American group of which Mr. Kuhn was also a member. There were several conferences about this matter. The men interested in the committee approached the problem from this idea: the human race was going into the air. That created a different legal problem than we had had before, and it was important to explore the legal situation at the outset and find on what basis to proceed.

Listening to the discussion this afternoon, I recall that practically everything that has been said here was debated in those conferences. That committee worked to a draft. About 1912 there was an effort to get a diplomatic conference. It was held in London, but came to no immediate result. About six months or eight months later it was reconvened and then worked up a draft which almost literally became the text of the aerial articles of the 1919 convention.

At the time that project was under debate, and after the publication of the 1919 convention, there seemed to be general agreement that the principle there established was on the whole a practical one. After all, aircraft rise from the ground and people on the ground are the ones interested in the action of the craft; so after all of the debate among the experts, or supposed experts, at the time it was felt that the control, always from the ground, recognizing the right of innocent passage, was on the whole a practical solution of the problem.

This comes to about the same end, from whichever direction you approach it. If you start from the one extreme thesis, as Professor Wilson did, you may add restrictions. If you start from the other end, then you make concessions. But in the end you get to about the same place, and inasmuch as aircraft always must start from the ground, it seems to me that the principle of the 1919 convention is a very logical place from which to start.

If I may say another word to Professor Garner's reference to our ratification of that convention. As I understand it, that ratification, or the consideration of it, has been largely held up on account of some objection, or supposed objection, to Article V. I have read the documents, as published in the third volume of treaties, and I flattered myself that when I read them I understood what they were driving at. I have been trying to recall what the objection was, but it now completely eludes me. It seems to have been an administrative objection, which has now apparently been corrected. This was effected by two protocols, and I have the impression that the United States authorities regard that convention, with those protocols, as at present and in general satisfactory. The Senate started to examine the documents early this year, but postponed consideration of them at the request of the Department of Commerce, which controls the administrative action of the government with regard to aviation.

Col. BOUVÉ. Mr. President, I desire to make only one or two short statements with respect to what has been put forward. There were a number of objections to the theory of national sovereignty with respect to the airspace superincumbent above the terrestrial limits of a state. One of them seems to be that the damage which can be looked forward to as the result of unrestricted flying is negligible. That I think is a question of fact, and I very much doubt whether the theory has a logical basis. It may well be found that were an airman to fly at a height of 50,000 feet or 5,000 feet or 10,000 feet over the country, it might not result, if he had to come down, in any injury to anybody. It might, on the other hand, result in immeasurable damage to the property or lives of the citizens in the subjacent state. If one man be permitted to fly at any height, if one foreign airship be permitted to fly at any height above a state, it must follow that anyone may be allowed to do so. That necessarily means that we cannot pick and choose the place where the damage will occur which may result from a crash to the earth. It has been suggested as perfectly true that nothing but a grease spot will be left. On the other hand, it is obvious that if flying of that kind were to be unrestricted, the time certainly would come, in the case of some accident, where a burning plane would fall in the midst of a populous city.

The other point was this: the allegation of the absence of control. That point has already been touched upon by Major King. If, as a matter of fact, which I think we all admit is so, control is exercised by our local laws over heights from 500 feet up, it necessarily follows that control can be exercised at any height at which it is practicable for airships to fly. I think the theory advanced that the damage is bound to be negligible, or is likely to be negligible in the case of one airman's fall, does not take into account that it would not be negligible under the circumstances which I have described.

MR. BLEWETT LEE. I would like to say a word. You know it is very hard to stop a lawyer when he once gets going. One of the speakers was

able to throw considerable light on a matter more or less obscure to me, and that is if you say that a man must fly beyond the range of gunfire, do you mean the absolute range of the gun or the effective range? The consideration comes into play there that, as you remember, the old three-mile limit was based upon what was earlier about the distance that an old smooth-bore cannon could shoot. We have kept that three-mile limit because it was found so convenient, much more convenient than a more extended one.

Now, in the same regard, as to the effective range of aircraft fire. Aircraft guns are designed, I suppose, to prevent the military use of aircraft. We will suppose that a bomber is effective at 12,000 feet. If you keep going higher you get so high you can not hit anything with your bomb. You have to be near enough to the ground to really reach your objective, and the higher you go the more difficult it is to get military use out of a bomb projectile. Also, if a military machine is being used to spy out the lay of the land, to see what is going on, if you get up above a certain height you get a great deal less information than you would get from lower down.

So, for certain practical considerations, the best aircraft guns that we have are not the ones of the longest range. If you are going to give military protection to a city, you get the most protection, not from the guns that shoot the highest, but the ones that most effectively command the height at which a military airplane flies. The Big Bertha, as I understand it, sent up a projectile to the height of forty miles from the earth, but suppose an airplane had been approaching the wood where it was concealed. Could you have hit it with the Big Bertha? It was very difficult to hit any part of the whole city of Paris with a Big Bertha. They never hit twice in the same place with it. Therefore, I say the effective range of a Big Bertha against aircraft—well, I would think it did not exist at all. I would think that, as a practical matter, nobody would try to hit an aircraft with such a gun.

Of course, in the present state of the art, I suppose that if, in order to fly, you had to go up forty miles, flying would be a rather poor idea. But bear in mind that with the proposed new aircraft for the stratosphere, you take your air with you. You are flying in two shells, one inside the other, so to speak, and if these very competent engineers are right, it will be quite possible to fly 50,000 feet above the ground.

When I was a boy we used to try to shoot bull-bats. They used to fly about at nightfall with their mouths wide open to catch the insects. The boy who could hit a flying bull-bat with a shotgun was considered to be a very clever shot. Bear in mind that these things will fly at night at a speed of, we will say, 500 miles an hour, 50,000 feet up in the air. What control can there be from below in the case of an airplane, an aerial projectile, you might say, of that kind? I do not think it would be practicable to hit them from the ground. It certainly would not be as effective as sending up aircraft to fight them, as we certainly could do. We do the same thing on the high seas. If any of our friends should become enemies and send their ships

against us, we would probably send our ships out to meet them and give them battle. But the fact that Nelson defeated the fleets of his enemies at Trafalgar did not make him legally the ruler of the sea. It did not give Great Britain ownership of the seas, and in the same way the fact that we can send up our aircraft to meet the aircraft of our enemies would not give us unlimited sovereignty of the air.

Mr. KUHN. Mr. President, besides remarking that such a noble gentleman as Mr. Lee was a very naughty little boy to destroy such a beneficial animal as a bat who was trying to catch the harmful insects in the neighborhood of his early boyhood, I simply wish to present the question to him and to Professor Garner,—Is it their idea that every access to the air, even at such a height as not to be harmful, or even within any conceivable effective range of the subjacent state, is to be applicable in times of peace only, or also in times of war? In view of the fact that the discussion has gone on from this range of gunfire, I am led to conclude, and I would like to be set right on that, that they have in mind also a time of war. Am I correct?

Mr. LEE. If you honor me with your question, Mr. Kuhn, I would say, if you follow the analogy of the high seas, that a craft flying beyond the reach or power of the state below should have the same rights and privileges as a ship of war on the high seas, and I would also say this—

Mr. KUHN. Is this an analogy really? Does it strike you as a fair analogy? I am asking not to present any view of my own, I assure you.

Mr. LEE. Mr. Kuhn, I would swallow it whole. I will tell you why. You take the case, for example, of ships of war. We let them come into our ports to escape from storm. We will give them provisions and coal and send them off within a day. On the theory that at a great height the analogy of the high seas comes into play, let us suppose this Canadian pilot, flying at what I shall call a proper height, when legally put within the protection of international law, if that man's engine fails or a terrible storm is approaching, he ought to be allowed to come down to a place of safety, make an emergency landing, or if his gasoline tank should fail him he ought to be allowed to come down and get repairs and get some more gasoline. In other words, I would follow the analogy of the sea, and I think as these planes get bigger and bigger, we will have to.

To illustrate the size of them, I understand the government compels you, if you carry 14 passengers, to have a pilot. If you carry more than 14 you have to have another one. How does that thing work? If you are going to have two men, you will have to have twice as big a ship. Otherwise you will lose money. You will make them bigger and bigger. And the same way with the Zeppelins. They are making them bigger and bigger all the time. I say the bigger they get, the nearer the analogy comes.

I do not pretend for a moment that the subjacent state should not have the same control over its atmosphere within the effective range of its guns that we have over our marginal waters. It is not recognized now by treaty,



but I think it must be if it develops, that there will be the right of innocent passage for fliers, and I do think that in case of emergency they should have a right to land and refuel. But all this is in the distant future. What I protest against now is that any state should say we should not cross over its country at any height and under any condition until we have got its approval. It seems to me that whatever promise there is in the airship for the human race, it does not lie in that way.

Professor GARNER. How about land-locked states? There are about a half dozen land-locked states in the world. What is their position? Of course, if a state is so fortunate as to have a maritime frontier, it can go anywhere. But take the aircraft of Bolivia and Austria and a dozen others. Under the rule of absolute sovereignty they are kept from flying anywhere.

Admiral WILLIAM L. RODGERS. I would like to say something about the question raised by Mr. Kuhn, about times of war. If we give away sovereignty over our own territory above a certain altitude, we would then have, on the analogy of the high seas, a free field for conflict above our own territory, and whatever happens in aerial warfare, the object is to destroy the enemy. We would have a lot of gunfire and crashes over our own territory which would certainly hurt us, and we cannot possibly think of giving up the control of sovereignty in the upper aerial space in time of war, whatever we think of the freedom which we might grant in time of peace.

Professor GEORGE GRAFTON WILSON. In the last war practically all these problems that have just been mentioned actually arose in connection with Switzerland and in connection with Holland, and each of those states maintained absolute sovereignty in the air above. While it might not be unpleasant for those who are navigating in the upper atmosphere to have freedom, and while they might be merely a grease spot if they fell down from this great elevation, as was said, you and I would prefer not to be under the grease spot. Safety for the subjacent state is essential. That is the problem.

Col. BOUVÉ. I would like to make just one more suggestion, Mr. President. It seems to me that the analogy between the air and the high seas fails decisively, and for this reason: A ship on the high seas beyond the range of our gunfire, involves the picture of our being beyond the range of its gunfire. We are then in a position to apprehend no damage, for the simple reason that the vessel on the high seas is in a position from which we can suffer no harm. But with respect to aerial territory, it is perfectly obvious that no matter how high airships go, we are always in danger of harm if there is any accident or any misfortune to the flier. As far as the deliberate infliction of damage is concerned, there is this difference—no harm from the vessel on the high seas under certain circumstances, but always a definite potentiality of immeasurable damage from a vessel in the air above the territory of the subjacent state.

Mr. F. C. FISHER. It seems to me that there may be a graphic way of



putting the difficulty, and that is, we live at the bottom of an aërial ocean. We only live on the edge of the aqueous ocean. If we lived at the bottom of the aqueous ocean, we might feel a little differently about the activities on the surface.

Secretary FINCH. Might I also state that the purpose of the defending navy in going out to meet the enemy on the high seas is to prevent him from coming within gun range of your own country.

The PRESIDENT. Any further discussion? If not, the discussion is closed.

Secretary FINCH. I move that we adjourn, Mr. Chairman.

(The motion was seconded and carried, and the meeting adjourned at 4.10 o'clock p.m., *sine die*.)

## ANNUAL DINNER

Saturday, April 30, 1932, 7.30 o'clock p. m.

The 26th Annual Meeting of the Society closed with the annual dinner in the Willard Room of the Willard Hotel, Washington, D. C.

Toastmaster: JAMES BROWN SCOTT, *President of the Society.*

Guests of honor and speakers:

His Excellency TYTUS FILIPOWICZ, *Polish Ambassador to the United States.*

Dr. HERBERT KRAUS, *Professor of International Law in the University of Göttingen.*

Señor Don EMILIO CODESIDO BELLO, of Chile, *member of the Guatemala-Honduras Boundary Tribunal.*

Honorable J. CHARLES LINTHICUM, *Chairman of the Foreign Affairs Committee of the House of Representatives.*

### MEMBERS AND GUESTS

Señor Don Luis O. Abelli, *Minister of Bolivia*, and Señora Abelli

Señor Horacio F. Alfaro, *Minister of Panama*, and Señora Alfaro

Señor Dr. Don Pedro Manuel Arcaya, *Minister of Venezuela*, and Señora Arcaya

L. Aström, *Minister of Finland*

Rev. J. Woodman Babbitt

Mikas Bagdonas

Mr. and Mrs. Hollis R. Bailey

Bronius Kasimir Balutis, *Minister of Lithuania*

Dantès Bellegarde, *Minister of Haiti*

Emilio Codesido Bello

Laura M. Berrien

Stephen P. Bisseroff

S. W. Boggs

Mary Bradt

Paul Bradt

Señor Don Juan Francisco de Cárdenas, *Ambassador of Spain*

George Bond Cochran

Kenneth W. Colegrove

Wade H. Cooper

Marshall Cronkhite

Señor Dr. Don Céleo Dávila, *Minister of Honduras*, and Señora Dávila

Guy W. Davis

Francis Deák

P. C. J. De Angelis

Miss De Angelis

Señor Dr. Don Luis Manuel Debayle, *Chargé d'Affaires of Nicaragua*, and Señora Debayle

William Cullen Dennis

William J. Donovan

Michael Francis Doyle

A. H. Feller

Ernst H. Feilchenfeld

Tytus Filipowicz, *Ambassador of Poland*

Augusta E. Finch

Eleanor H. Finch

Mr. and Mrs. George A. Finch

Richard W. Flournoy, Jr.

Arthur M. Free

Beatrice Golze

Mr. and Mrs. R. L. Golze

M. Gonsiorowski

Green H. Hackworth

- Albert Bushnell Hart  
 Mr. and Mrs. Henry B. Hazard  
 Dr. and Mrs. Thomas H. Healy  
 Mr. and Mrs. Allan T. Hurd  
 Niilo Idman  
 Mr. and Mrs. Thorsten Kalijarvi  
 Robert F. Kelley  
 Mary Emily King  
 Franklin F. Korell  
 Dr. and Mrs. Herbert Kraus  
 Arthur K. Kuhn  
 Brig. Gen. Rufus Lane  
 Frederick R. Lehlbach  
 Mr. R. Lima e Silva, *Ambassador of Brazil*, and Madame de Lima e Silva  
 J. Charles Linthicum  
 Johann G. Lohmann  
 Eric Hendrik Louw, *Minister of South Africa*, and Mrs. Louw  
 Señor Dr. Don Fabio Lozano, *Minister of Colombia*  
 Francis Crane Macken  
 Michael MacWhite, *Minister of the Irish Free State*  
 Paul May, *Ambassador of Belgium*, and Madame May  
 Mr. and Mrs. Charles S. McDonald  
 O. H. McPherson  
 Mr. and Mrs. Carl L. W. Meyer  
 E. E. Moeckel  
 Ahmet Muhtar, *Ambassador of Turkey*  
 Denys P. Myers  
 Harold H. Neff  
 A. Patricia O'Quin  
 Albina S. Parkins  
 Mr. and Mrs. Robert P. Parrott  
 Jefferson Patterson  
 Marc Peter, *Minister of Switzerland* and Madame Peter  
 Pitman B. Potter  
 Simeon Radeff, *Minister of Bulgaria*, and Madame Radeff  
 Señor Dr. Don Adrian Recinos, *Minister of Guatemala*, and Señora Recinos  
 Jesse S. Reeves  
 Mrs. Olive G. Ricker  
 Admiral W. L. Rodgers  
 Mr. and Mrs. James Brown Scott  
 Sesostri Sidarouss Pasha, *Minister of Egypt*  
 Isaac J. Silin  
 Forrest E. Single  
 Dorothy Somerville  
 Ruth E. Stanton  
 Doris Stevens  
 Ellery C. Stowell  
 Claire Streit  
 Count László Széchényi, *Minister of Hungary*  
 Henry W. Temple  
 Mr. and Mrs. Edgar Turlington  
 Mrs. Elonzo Tyner  
 William R. Vallance  
 Mr. and Mrs. Arthur H. Vandenburg  
 Otto Wadsted, *Minister of Denmark*, and Madame Wadsted  
 Charles F. West  
 Wallace H. White, Jr.  
 Marjorie M. Whiteman  
 Gwladys Williams  
 Mr. and Mrs. William E. Willis  
 George Grafton Wilson  
 Robert R. Wilson  
 Lester H. Woolsey  
 Quincy Wright  
 Herbert Wright  
 Señor Don Pablo M. Ynsfran, *Chargé d'Affaires of Paraguay*, and Señora Ynsfran  
 J. Edwin Young  
 Señor Don Gonzalo Zaldumbide, *Minister of Ecuador*

The invocation was pronounced by the Reverend J. Woodman Babbitt, Assistant Minister of the Church of the Covenant, Washington, D. C.

At the suggestion of the Toastmaster, a toast was drunk to the President of the United States.

#### AFTER DINNER SPEECHES

The TOASTMASTER. Ladies and gentlemen: The moment for which we have so long looked, and apparently in vain, has at last come. We will presently turn from the material things of life to the spiritual things, which after all are the only things that matter, the only things that count.

Some 26 years ago a group of youngsters had a dream, a dream that we could one day foster the study of international law and promote the establishment of international relations upon the basis of law and justice. For 25 years we of the American Society of International Law have been true to that ideal, and the dream is still before us. In that faith we shall continue to the end that through societies such as this international relationships, based upon law and justice, may be established as are the relations of individuals within the state.

We have not come, however, to hear of those things or of the small results which a society such as this has accomplished in the quarter of a century which has now passed. We are here tonight to listen to the friends who honor us with their presence, and in the first place to listen to a distinguished ambassador. When I think of him, I recall what Pope once said of Lord Chief Justice Mansfield (known by his younger name of Murray): "How many Ovids were in Murray lost."

It is almost unbelievable, but it is a fact that the ambassador who I am shortly to introduce is not merely familiar with the British Museum, having seen it from the top of a bus, or having had the automobile in which he was riding pass it; he has actually entered the British Museum, he has fingered its treasures, and he is here tonight to show that an ambassador may be a scholar to his fingertips, and how lightly he may wear his learning.

But before I introduce him, I would like to say a word of his country. When we were a young and struggling people, looking across the Atlantic in the hope that something might be described upon the horizon, certain friends came to our aid and helped to make us what we are. If you would know who they are, you only need visit the City of Washington, and in Pennsylvania Avenue you will find an equestrian statue of Pulaski, who gave his life in order that America might be free. If you should desire another reason why we are bound heart and soul to the country which the Polish Ambassador so worthily represents, stroll through Lafayette Square and admire the statue of Kosciuszko. Verily, those who are possessed of a noble ideal and strive for its realization have not lived in vain, and those who have stood for the truth and have suffered for it, nevertheless have the happiest of lives.

Ladies and gentlemen, I have the very great pleasure of introducing the Polish Ambassador, His Excellency, Tytus Filipowicz, who will speak upon a topic which would more become a professor, you may think, than one who is engaged in the strenuous duty of representing his country.

## THE ACCOMPLISHED SENATOR

By H. E. TYTUS FILIPOWICZ

*Polish Ambassador to the United States*

Whenever I read the American Declaration of Independence a question occurs to me, What is the ancestry of it? What was the background of the Jeffersonian ideas and their source of inspiration? Have some of the conceptions been formulated before, and if so, when and by whom?

These questions have occurred earlier to others and many attempts have been made to answer them. The biographies of Thomas Jefferson by H. S. Randall and John T. Morse,<sup>1</sup> and especially the excellent studies of Professor Gilbert Chinard of Johns Hopkins University,<sup>2</sup> give the names of those whose works inspired the distinguished Virginian. These were: Blackstone, Helvetius, Montesquieu, Jean-Jacques Rousseau, but especially Algernon Sydney and John Locke, whose *Discourses Concerning Government* and *Two Treatises of Government* were admittedly the source-books used by Thomas Jefferson, as well as by other founders of the Republic. Recently, however, such an authority as Dr. James Brown Scott, in an address delivered on May 13, 1931, at the Law School of Georgetown University,<sup>3</sup> traced the ideas of Sydney and Locke to Cardinal Bellarmine, S.J.

Professor Scott's research forms an important contribution to the history of the forerunners of the ideas expressed in the Declaration of Independence. But what about Bellarmine himself? If it can be shown that in the period immediately preceding that of the great cardinal, there was an author of influence who expounded similar theories, then the link connecting the Declaration of Independence with the past ought to be traced further back.

In the year 1568 there were published in Venice two volumes in Latin of *De Optimo Senatore*, by Laurentius Grimalius Goslicki, Senator and Chancellor of Poland, later Bishop of Poznan. A new Latin edition was subsequently published in Basel in 1593. The book was never translated into the author's own language—Polish. It was translated into English and published in three editions.

<sup>1</sup> Randall, H. S., *The Life of Thomas Jefferson*, 3 vols., New York, 1858; and Morse, John T. Jr., *American Statesmen—Thomas Jefferson*, Boston, 1883.

<sup>2</sup> Chinard, G., *Jefferson et les Ideologues*, Baltimore, 1923, and *The Commonplace Book of Thomas Jefferson*, Baltimore, 1926.

<sup>3</sup> Scott, J. B., *Address on Cardinal Bellarmine*, *Georgetown College Journal*, November, 1931, p. 31.

*The Accomplished Senator* presents the philosophy of political science. The title itself describes only a part of the contents. As would be expected, Goslicki quotes Plato, Aristotle and Cicero, and lays emphasis on those conceptions which constitute their title to be recognized as fathers of political science. However, he is far from being merely another popular Renaissance writer on the ideal government based on the Greek and Roman classics. On the contrary, he delivers a series of political opinions, which in his day were considered new contributions to political theory.

The wealth of Goslicki's philosophy defies an attempt to present it in a nutshell. There are passages which do not admit of abbreviation. The object of his book is to stimulate in others the study of the difficult art "by which men are directed to the utmost happiness their nature is in this life capable of"—the art of government.

But let us hear Goslicki himself:

I am not forming to myself an imaginary idea of a Good Senator, nowhere really extant, but in the mind; and whose shining original is only to be found in heaven, without casting the least shadow or resemblance of it upon earth: Plato's Commonwealth and Cicero's Orator are airy topicks, which I shall not presume to meddle with: for my enquiries are all entirely confined to common life, agreeable to the customs of mankind, and altogether intended for publick use and benefit. (p. 3.)

... For us, and our undertaking, the method and manner of writing we propose to follow, are entirely adapted to common use, and fitted to the necessities and customs of mankind. (p. 48.)

The above quotations show Goslicki as the scholarly man of affairs who doubts the fine theories woven by the ancients or by those unfamiliar with the immediate actualities of government. He is a realist who faces the actual world as daringly as Machiavelli.

In the dedication of his work to Sigismund-Augustus, King of Poland, the author writes: "No government can be happy or miserable without involving its people in the same state and condition." (p. xxvii.) It is this interdependence between the governing and the governed and the establishment of normal relations between them that forms the foundation of Goslicki's political philosophy.

It is for the sake of the citizen or subject, that every good government or commonwealth was at first formed and instituted. (p. 62.)

... in the private happiness of the subjects consists the general and publick happiness of the commonwealth. (p. 27.)

The felicity or happiness of every commonwealth, is to be measured by the felicity or happiness of the subjects or citizens, who are the members of it. For such as are the manners and reputation of the citizens such will every city or society be in its reputation and character among men. (p. 74.)



Who—in Goslicki's opinion—is a citizen?

. . . it is very evident, that in all commonwealths and cities whatsoever, those men, who have a right of giving their opinion and vote in all matters relating to the publick, and are capable of being made magistrates or officers, in the government or city, to which they belong, have the best claim to the name of citizens. (p. 68.)

But let us examine his conception of "People."

By the word People, I do not mean a mixed multitude of rusticks, boors and mechanicks, the mob and rabble, the scum and lees of a country; but a regular body of citizens and subjects, generous by birth, civilized by education, and every way duly qualified to fill the publick offices of a state, whenever they shall be legally invited and advanced thereto. (p. 38.)

It is very characteristic for Goslicki that, contrary to many other political authors, he makes no distinction between the term "people" and the term "citizen." To him everyone of the people is a citizen enjoying full political rights. No doubt, in our times, Goslicki would appear too conservative in his denial of civic privileges to the "rusticks and mechanicks." Yet in his definition of "people" as citizens endowed with all political rights he is completely modern.

The Senator, according to Goslicki, is to be the intermediary between the government and the governed:

. . . the Good Senator, who fills the middle station between Prince and People, may engross the perfections of both to himself; and whilst he is thus posted, may plainly discern, how and in what manner, king, people, and commonwealth behave in their several places and offices; how the magistrate performs his duty, and what care is taken of the laws and liberties of the subject; and as the balance turns, he may provide accordingly, and timely prevent a daring and licentious people from running into anarchy and confusion, or an ambitious monarch from aspiring to tyranny and usurpation. (p. 61.)

Having set forth that the preservation of harmony between the orders is conditional on obedience to law, Goslicki gives his idea as to the nature of "wholesome laws" and expresses his conviction that laws should rather prevent than suppress crime and evil:

There is one way and method commonly made use of, by good and wise senators, in the framing and compiling of laws, which is, to aim them rather at the preventing, than the suppressing of evil; and thereby to cut off from every subject all opportunity and occasion of offending. . . . And I should rather choose to trace and enquire into the rise and original of it (of the law—Ed.) and to cut it off at the fountain head, by suppressing its first causes, than by pursuing it with severity, through all its effects and consequences. In my opinion all our counsel and wisdom ought first to be employed in bringing men to justice, rather than to execution. (pp. 175–176.)

... a good legislator will always take care, that his laws should rather appear as precepts and persuasions to good manners and discipline, than in a prescribing and mandatory form. The end and design of all laws is to make the people good and happy, and agreeable to this, ought the mind and intention of the legislator always to be. For the punishing of delinquents is rather a case of necessity, than of choice. (pp. 233-234.)

If a country has such laws it will not be difficult for its citizens to observe them, says the author.

Goslicki takes many pains to indicate that once laws are enacted they should be observed:

... let the Senator, in all cases, and on all occasions, take particular care, that the laws and customs of his country be duly and punctually observed; and let him be sure to oppose the first efforts and tendencies to sedition, before it spread too far, and gather to a head. (p. 166.)

To prevent these mischiefs, the right way and method is, to be always strict and severe in the due observation of the great and fundamental rule of equality, by which the safety and welfare of a state . . . and subjects, are effectually maintained and preserved. Wherever this doctrine and principle of equality is disregarded, or not well attended to, civil feuds, animosities, and contentions, naturally follow, and infest that government, in which equals aspire to an unequal or superior state, and unequals or inferiors to a state of equality. (p. 160.)

Goslicki lays considerable stress on the proper administration of justice. "Civil wisdom or discipline is nothing else," he says, "but the art of directing and conducting our own lives, and the lives of all our countrymen and fellow-citizens, according to the rules and precepts of virtue and justice. . . ." (p. 107.)

Goslicki's equality is the equality as between responsible citizens only. In spite of this limitation, such conception of equality, as well as his opinion that laws should prevent rather than suppress crime, were new ideas for his time.

Now we approach the point which, in its time, won the popularity for the book,—to Goslicki's theory of monarchy.

The limited monarchy which Goslicki, following Plato, considers as the best form of government can, according to him, function well only when based on the existence of perfect harmony between the king, the senators *i.e.*, a representative body of the king's councillors, and the people, *i.e.*, responsible citizens. This harmony can be reached when each of the three orders observes the law:

If the king abuses his just power, and exceeds the proper bounds of his regal office, we are then liable to be enslaved by a single tyrant; if the senate are false to their trust, we are in danger of having many absolute lords and masters set over us; and if the multitude or populace, by open force and violence, get the better both of the regal power and senatorial

authority, we shall then be visited with a mob and rabble of tyrants, the greatest plague that can befall a society. Unless, therefore, in every commonwealth, thus formed and constituted, the office, liberty, jurisdiction, dignity and authority, of each of these three orders be punctually set out, ascertained, and circumscribed, by good and wholesome laws made for that purpose; and every member of each order be duly and effectually restrained, not only by their own fears, but by special penalties, from all vice and injustice, and from the breach of those laws, which confirm them in their several powers and dignities, the honest well-disposed subject will in vain look for rest and quiet, and all the happiness of private life, under such a constitution. (p. 157.)

If occasion should arise, special penalties which are to restrain the commoners of the state from vice and injustice shall equally apply to the Prince. Herein lies the most original part of Goslicki's political philosophy. According to Goslicki, the King must know:

That kings were made, not for their own, but their people's sake; and that in all their councils and undertakings they should prefer the joint and common, to any separate or private interest whatsoever. They govern by, and under the law; and the great design of their government is, that the rights and liberties of their people may be maintained and preserved. (p. 152.)

And, if the popular liberties are violated by the ruler, people have the right to revolt and, in doing so, they still remain within the domain of legality.

Sometimes a people, justly provoked and irritated by the tyranny and usurpations of their kings, take upon themselves the undoubted right of vindicating their own liberties; and by a well-formed conspiracy, or by open arms, shake off the yoke, drive out their lords and masters, and take the government entirely into their own hands. (pp. 32-33.)

This is, to my knowledge, the earliest statement in a political treatise of the right of revolution.<sup>4</sup> The doctrine is evolved further in the following passage:

Kingly Government is very aptly represented by the power and authority, which a father has over his children, whose office it is to be careful of, and watchful over them; to provide for their sustenance and welfare. . . . In the very same manner, all good Kings ought to behave towards their subjects. . . . Now as a father, when he becomes eminently wicked, and is remarkably cruel and inhuman towards his children, does thereby lose the very name of a father, and is no better than an unnatural tyrant. So when a King is under no restraint, but of his own will and lusts, when he tramples all law under foot, is by his life a scandal, and in his government a plague to his people, he immediately forfeits the name of King, and cannot justly be called by any other title, but that of tyrant. (pp. 16-17.)

<sup>4</sup> If we take documents outside political treatises, the earliest recognition of the right of revolution is embodied in the Hungarian Constitution of 1222.

In short, the deposition and execution of a tyrant does no more constitute unjust rebellion or regicide than the imprisonment or execution of a perverted parent—the crime of parricide. It is an astonishingly frank statement and its simplicity of form gives a striking force to the analogy.

In England at the beginning of the 17th century Goslicki's theories fell on fertile ground.<sup>5</sup> All denominations of dissenters found in Goslicki's book new knowledge and new inspiration. The appearance of two English editions of the book coincided with the increase of strife between the Crown and the opposition, which culminated in the revolution of 1648. The British Museum has a unique collection of pamphlets and leaflets of the pre-revolutionary period. In my student days in London I was for a time possessed by a mania for reading those old papers and making extracts from them. Some of these old pamphlets contain quotations from Goslicki. Writers who advocated the responsibility of the Crown based their claims on his authority. In some leaflets the name of the book from which the quotations were taken is given; in others it is omitted. Thus, although the two first English editions of *De Optimo Senatore* were confiscated by the authorities, the ideas expressed there were popularized in numerous political leaflets. It seems that to the English republican writers of those days the book of Goslicki played a part similar to that of Rousseau's writings and their influence on the French Revolution.

Goslicki's book appeared just at the proper moment to supply the theory needed for practical considerations. At the time when the political atmosphere of England was getting ripe for the revolution, the offended feelings of the populace found a comforting moral justification in the axiom of responsibility of kings. Thus, it seems that the last act of the tragedy, the judgment condemning Charles the First, echoed in its language the grim argument of *The Accomplished Senator*.

There exists a still more objective, although indirect, proof of the authority which Goslicki enjoyed in some circles. The late Professor Israel Gollancz, of Cambridge, England, who was aware of the influence of *The Accomplished Senator* in England, took an interest in Goslicki from other motives than political. In his lecture before the British Academy, on April 27, 1904, published afterwards as a manuscript, he tried to explain how it came about that in Shakespeare's *Hamlet* the person of Polonius did not appear in the first edition, but only in the second. Professor Gollancz expressed the view that after the first edition of *Hamlet* was printed, Shakespeare met Goslicki, who probably sojourned for a short time in London as an

<sup>5</sup> The first edition was published in 1598 under the title *The Counsellor Exactly Pourtraited*, and was immediately suppressed. After the death of Queen Elizabeth a second edition was published in 1607. But the new title *A Common-Wealth of Good Counsaile* did not prevent the book from being suppressed again. The third English edition entitled *The Accomplished Senator* was published in 1733. The figures given in the text in parentheses after quotations indicate the pages of the third edition, a copy of which is in the Library of Congress in Washington, D. C.

envoy to the Court of St. James, and immortalized him satirically as Polonius. Also, according to Professor Gollancz, some of the passages from Goslicki's book have been incorporated in both *Hamlet* and *Measure for Measure*. I cannot judge how far the hypothesis of the eminent Cambridge professor will be borne out by further research, and I am mentioning it here only to show that Professor Gollancz was inclined to trace the influence of Goslicki on contemporary England also outside the domain of political controversies of the day.

Although Goslicki does not give a description of the contemporary political institutions of his own country, Poland, yet, he expounds and develops to its extreme consequences the political philosophy on which were based some Polish political institutions of the 16th century.

His definition of people bears on its surface the imprint of conditions in Poland, where the only people who mattered in that epoch were those who had political rights, *i.e.*, the nobles and small gentry ("gentry people"—*lud szlachecki* in Polish).

The Polish monarch was an elected and constitutionally limited ruler. The right of the people to vindicate their liberties violated by the tyranny of their king was an accepted doctrine in Poland, where the elected kings themselves had to agree to it under the so-called *Pacta Conventa*. But in France and England of that period, where the monarchical system was at its height, such ideas sounded of rebellious democracy in revolt against the legitimate rulers.

I mentioned above that in his realistic perception of men and institutions, Goslicki reminds us of Machiavelli. He differs, however, from the author of *The Prince* in a supremely important fundamental matter, *i.e.*, in his concept of the nature of a political man. Taking full account of the importance of the baser motives in human life, he believes in magnanimity as an important factor in the government of the state. That balance and soberness of thought—Goslicki is never sentimental—is rare in a man of books, and is another mark of the originality of his views.

There is a philosophic breadth in Goslicki's conception of government. The reader is never allowed to lose sight of it. The mere mechanics of government—though as a good parliamentarian he knows their importance—occupy him less than the spiritual qualities of the men who must use them. For Goslicki, good government is government by good men. "Seek me first," he might have echoed the great injunction, "good men, and all else shall be added to government." He is, in the noblest meaning of the word, a humanist.

I am conscious that all this time I have been speaking of an old book, and I feel apologetic for occupying your attention with an interpretation of a worm-eaten text. However, my friend, Professor Scott, must share the blame because of the encouragement which he has given me to present my impressions. My excuse lies in the intention of rescuing from the great mass

of historical detail some fragments which may be of particular interest to an American scholar. Goslicki's book impressed its mark on the Cromwellian period of English history, a period in which early American political thought is deeply rooted.

While it may be difficult to maintain that Goslicki was the original spiritual father of all ideas which he propounded, it is safe to assume that the popularity of some of them in pre-revolutionary England could not have been without influence on the minds of those emigrants who left for America about that time.

We have seen that Goslicki had the highest admiration for the democratic form of government, except that he feels that in it tumults and disorders are "almost unavoidable." Did not the Fathers of America, putting their trust where he placed his, in the middle order of representatives, wisely and triumphantly risk the challenge of his "almost"?

Goslicki fears the threat to liberty and order from two sources: from a too powerful executive; and from a too powerful citizen mass. His is a system of "checks and balances." If he fears with Hamilton, say, the changeable, ignorant, potentially turbulent mass, he fears not less with Jefferson the concentration of power above. He outlines the theory of compromise arranged in practice by those extraordinary minds that framed the first Government of the United States of America.

A study of Goslicki's theories in the light of those of Cardinal Bellarmine, as well as of early American political writers, would be, in my opinion, distinctly worth while. Whether, under such circumstances, one of the American institutions of learning should not encourage a study and research of these problems, is a question not for me to decide.

In any case, I feel sure that the American reader of *The Accomplished Senator* will recognize in the pages of the 16th century Polish thinker a distinct similarity with the pattern of the American democratic ideal.

**The TOASTMASTER.** It was a great tribute to the poet Homer that seven cities contended for the honor of his birthplace. It is a great tribute to the Declaration of Independence that its origin should be traced to so many sources. Having settled the matter tonight through the learned professor's lecture—as he is pleased to call it—that the Declaration of Independence is of Polish origin, it is my pleasant duty to say a word in behalf of the next speaker who honors us with his presence tonight.

We are, I beg to assure him, a very grateful people. If, knowing as he must, that we raise monuments to those from Poland who have offered their lives to us that we might be free, he should wander through Lafayette Square—the name of which is indicative of a friendship which can never be forgotten—he will find a noble bronze commemorating a fellow countryman who came to us in our greatest need, and, engaged by Washington as Inspector General of the American army, he drilled our recruits and fashioned them into veterans. His name is so familiar to us and is so frequently upon our



lips that it has become Americanized, and Dr. Kraus would fail to recognize in Steuben's name a fellow countryman, if he did not himself speak our American English. However this may be, the Baron von Steuben is a fellow countryman of the next speaker, as well as a fellow countryman of the people of the United States.

The gentleman who is about to speak did us a very great honor in his early youth, when, after completing his studies in Germany, he repaired to the United States in order to continue them in an American university, and, *mirabile dictu*, he wrote a treatise, and an admirable treatise, upon the Monroe Doctrine. He therefore has a claim to our admiration as well as to our respect. For the last few years he has sought to demonstrate by concrete example that law is not law unless it has a moral and an ethical content. That is true of law in general—of municipal law, of international law—and our relations can not be based upon justice unless international law be looked upon as a branch of the moral sciences, with a moral and with an ethical content.

Ladies and Gentlemen, I have the honor to introduce a lawyer—and an international lawyer at that—in whom there is no guile, Dr. Herbert Kraus, Professor of International Law in the University of Göttingen.

#### REMARKS OF DR. HERBERT KRAUS

*Professor of International Law, University of Göttingen*

As a member of the American Society of International Law, in fact as a very old member, dating from the era before the World War, that happy period in which I studied international law in America—as such an old member I feel I have the privilege, nay even the duty, to exercise a certain criticism of our Society on such a festive occasion.

I believe that our Society is too modest when it calls itself the American Society of International Law. It is far more than an *American* society—and it limits itself even less to the study of specifically *American* questions; it is not a society for *American* international law. Above all, however—a point which lies very close to my heart—it should, and must, not confine itself to the treatment of purely legal questions. Its natural task, as one of the most distinguished international societies, whose proceedings are attentively watched and followed by all internationalists of the world, is to examine every side, every question which is presented by the great problem of international order.

We are familiar with the different branches of international science, dealing with the problem of international order: comprising international law, world economics, international relations, political principles, psychology, pedagogics, international manners, and last but not least, international ethics, etc. In giving these examples we realize at once how fragmentarily the international problem has been dealt with so far, and how completely some of its branches have been neglected.

I do not refer by this so much to world economics—nor, at least as far as the United States is concerned, to international relations, that branch of science so far little dealt with and little understood in Europe. Nor do I mean primarily that most important branch of international doctrine, which might be called the doctrine of international political principles. These are general rules for the actual conduct of states in international affairs, which have not necessarily legal prescriptions to support them. You are familiar with the chief examples: the Monroe Doctrine, the principle of isolation, free trade or protectionism, two-power standard, dollar diplomacy, open door policy, permanent neutrality, the principle of legitimacy, balance of power, Pan-Americanism, President Wilson's principle of the clean hand, etc. These general international maxims play an especially practical rôle in international life, some of them a greater one by far than many rules of international law. Not a few of them have been accorded an exhaustive monographic treatment; but we are still waiting for a great comprehensive study examining their nature and their essential features in common, as well as their relations to international law.

The branches which are particularly neglected, however, are international psychology, international pedagogics, and international ethics. Why does the process of international integration progress so slowly; why do fear and distrust still control the relations of states to such a great degree? What rôles are played by natural inclination and dislike, love, hatred, compassion, etc., in the lives of the people? These and other similar questions can never be fully solved by legal methods; for they constitute by their nature psychological problems. And until we turn our keen attention to them, study them systematically, we will endeavor in vain to master the great international problems of our time and of many generations to come. For behind all of them, in the last analysis, lies a problem of international psychology; and this is quite as true, to mention only two especially actual and momentous examples, the reparation problem and the problem of international disarmament. Until the world Powers persuade themselves to have confidence in each other, and in particular until all of the leading states trust fully in Germany's good will, these two questions must remain in the dangerous deadlock in which they are at present.

Just as little as the problems of international psychology, can the even more acute questions of international pedagogics be solved by legal methods only. It is of course excellent that the Polish Government recently made proposals for the furtherance of moral (or I should prefer to say intellectual), disarmament to the League of Nations, which, among other features, relate to a surveillance of the press, moving pictures, radio, and school books, in the spirit of international conciliation. And I regret exceedingly that the suggestions of a similar nature made by the German Peace Delegation in 1918 to be included in the draft of the Covenant of the League of Nations, were allowed to fall under the table.

But there is a great deal which can neither be effected nor enforced by paragraphs and treaties. A conciliating tone towards other states, and a dignified form of thought and action in international life, are problems of the sensibilities, and consequently of education. And who doubts that, not only single individuals, but also whole nations need education in international behavior?

The same thing is true of that twin brother of international law—international morals. The tendency of specialization which at present controls our intellectual work, the division of science into numberless single branches, and the sense for purity of method connected therewith, is of quite recent date. The fathers of international law both before and since Hugo Grotius never troubled their heads greatly about the differences between international law and international morals; and, consequently, their works contain an interwoven mixture of doctrines and rules of international morals as well as law. Today we make a sharp theoretical distinction between law and morals. But we do this at the cost of international morals. For, whereas international law and the policies of international law have blossomed almost tropically since the war, the person who preaches international ethics today is a voice crying in the wilderness. And this in a time in which the moral needs are greater than ever before.

The nations, that is, the sum of those individuals who in the end must pay for whatever transpires between the governments, measure the great international events and problems of our era less than ever from a legal point of view—this is far too complicated for the ordinary man—but from a moral standpoint: the problems of minorities, mandates, security, reparations, disarmament, the treatment of foreigners, outlawry of war, the present situation in the Far East, etc., are in international public opinion primarily moral issues. Everyone to whom the fine scales of this public opinion has been revealed, who knows how to read it, feels and realizes this fact constantly more and more.

As far as international practice is concerned, however, the discouraging fact must be stated that international morals so far do not, as a rule, get beyond the opening speeches of diplomatic conferences, after-dinner addresses, and the preambles of treaties. An exception to this must be made however for the fine clauses in our modern arbitration treaties, which guarantee *bona fides* and *aequitas*—essentially moral notions—their place in international decisions, and thereby in international law and life.

Apart from this, I cannot free myself from the impression that at present legal regulation is sometimes undertaken in cases where the moral ground has not been sufficiently prepared. We all believe that moral commands and prohibitions, for which there is no parallel legal prescription, can and do exist. But *legality without morality constitutes empty words and phrases*. Here, in the definition of the limits of law and morals, international doctrine can render fundamental services in the interest of international order.

Nor is the science of international law by any means uninfluenced by the moral tendency of our epoch. This is proved by the recent rapid reawakening of natural law on an ethical basis, particularly in the spheres of international law, and especially in the doctrine of the fundamental rights of states, of men, and also even of minorities. In other words, our epoch imperiously demands thorough scientific investigations and discussions of the problems of international ethics. Is it not very noteworthy that Dr. Scott, apparently also swayed by this same line of thought, selected the subject of: *A single standard of morality for the individual and the state* for his Presidential address.

And so I feel justified in closing with the hope, nay the expectation, that the American Society of International Law will not allow these laurels to be reaped by another branch of learning. Certain tendencies in this direction are noticeable in the camp of the philosophers. We international lawyers are most familiar with the facts on which such a science as international ethics is to be built up, for they are the same as that from which international law springs: The international problem, the wish for effective harmonious international order, and the desire for world peace.

The TOASTMASTER. Dr. Kraus, on behalf of the American Society of International Law, I beg to assure you that the wish of our organization at the present moment would be "more power to your elbow."

There is a sort of romance, a sort of poetry, in figures—I will not say in mathematics, because it does not become one who entered college with a condition in mathematics from which four years later he was destined to graduate with that condition still standing in his way; nevertheless, there is a sort of poetry, a sort of romance, in numbers. For example, 1732 recalls to us the birthday of Washington, to whom under God our liberty is due. 1632 evokes to the international lawyer the memory of Pufendorf—no mean internationalist. But the greatest number for international lawyers is 1532, when a noble Spaniard came forward as the advocate of the oppressed Indians of America, who had been discovered some forty years previously, laying the foundation of a new law, a law extending not merely to all branches of Christendom, but to those beyond the confines of Christendom. Four hundred years ago it is that Francisco de Vitoria professed at Salamanca the fundamentals of international law based equally upon justice and that morality which Professor Kraus is trying to introduce into the practice of nations. May he be successful.

I would ask His Excellency, the Spanish Ambassador, to communicate to his government the fact that the American Society of International Law avails itself, in 1932, of the opportunity to express its appreciation and admiration of the noble Spaniard who, in discussing questions of international import and of morality, as well as of law in the strict sense of the word, furnished to international lawyers, in his tractate on the Americans, the first adequate moral statement of the law of nations.

There is indeed a poetry and there is a romance in the year 1832. In that year, in the little city of Santiago de Chile, appeared a work in Spanish on international law, entitled *Principios de Derecho de Jentes, por A.B.* It came from the brain of a Venezuelan by birth, a Chilean by invitation and adoption. I beg His Excellency the Venezuelan Minister to transmit to his government our appreciation of the immense services which his illustrious countryman has rendered, not merely to the law of nations, but to the literature of the vast Spanish-speaking world. Of this distinguished gentleman, the Ambassador from Chile, who intended to be present tonight and to express the debt of gratitude which the Americas owe to this noted publicist—Andrés Bello by name—has recently said, in an address of which I hold in my hand a copy:

Among the leaders trained by the churchmen, there is one who shines with a light all his own; a man rich in wisdom; profound in knowledge; beloved and respected as a man, a father, a public servant, and a citizen of Spanish America; a humanist whose learning is unparalleled by that of any other man of his time in the Americas; a philosopher and educator; a writer of inspired poetry and a scholar in many literatures; a lawmaker and interpreter of legislation; a schoolman whose broad erudition would have warmed the heart of Benjamin Franklin and Thomas Jefferson, the only two among those who labored for the independence of the United States whose breadth of culture was comparable to his; an early tutor and guide to Liberator Simón Bolívar; and the author of the first treatise on the Law of Nations to be published in our Continent. This man, who wrote the Civil Code of Chile; who established the jurisprudence of the Chilean Foreign Office, and inspired my country's Pan American policy of peace and coöperation; who founded and presided over the University of Chile, and made it an institution of higher learning without equal in the New World; who preserved the pure faith of a child unto his deathbed, and whom we still revere as our greatest teacher, is Don Andrés Bello.

We are this year commemorating the 100th anniversary of Bello's treatise on the law of nations, a volume which has greatly influenced the study of international law in Spanish America.

It is a curious coincidence that an American author, a successor of the American barbarians of whom Victoria had so admirably discoursed, should have been the first to prepare and to publish in this western world a complete and separate treatise on the law of nations. It was the standard when it first appeared and it is still a classic. On behalf of the American Society of International Law, I shall beg the Chilean Ambassador when he returns to Washington to transmit to his government an expression of the appreciation in which Bello is held by the publicists of North America, and it is my very great pleasure, as it will be your pleasure, to listen to one who is not merely a distinguished jurist and publicist of Chile, designated by Honduras as its member on the Guatemala-Honduras boundary tribunal,—and of which a past President of this Society, the Chief Justice of the United States, is chairman,—but who is also a grandson of Andrés Bello.



Ladies and Gentlemen, I have the immense satisfaction of presenting the Honorable Emilio Codesido Bello.

REMARKS OF SEÑOR DON EMILIO CODESIDO BELLO

*Member of the Guatemala-Honduras Boundary Tribunal*

Mr. Chairman, Excellencies, Ladies and Gentlemen:

On behalf of the descendants of Andrés Bello, I wish to express our deepest appreciation of the kind words in which the eminent President of this learned assemblage, Dr. James Brown Scott, has eulogized his memory and praised his contributions to international law. No greater honor could come to him than to be remembered by the American Society of International Law, an institution whose lofty ideals of progress and promotion of closer ties between the peoples of this continent are inspired by the same spirit of Americanism which underlay his whole work.

I could not convey to you, in a language which is not my own, the noble meaning we attach to this act of solemn commemoration. The tribute of this distinguished body of jurists to a devoted servant of intellectual advancement and of education during the early days of the Hispanic-American nations, is an honor which reflects principally upon the country which most directly received the fruits of his endeavors, and also reaches in a special manner those who inherited his name, and who carry his blood into new generations, although devoid of his talents and of the privilege of reaching, like he did, into the sources of wisdom, whence flow unconquerable the forces which make for human progress.

No dividing boundaries separate men who labor in the field of science and in the discovery of truth. The stronger ties of kinship develop between those who devote their intellectual efforts to serve peoples of the same origin and bound together by an identical aspiration to add luster to the name of the common fatherland, of the community of free nations in the Americas which have been ennobled by sacrifices made in common to conquer and defend their independence, and consecrate the republican institutions adopted by the modern democracies of the New World.

Many decades devoted to cultural pursuits in those sister nations, to the dissemination of knowledge in the sciences and the letters, to inquiring into the very philosophical foundations of law and justice, and into the primitive sources and fundamental rules of the language, show the essentially American spirit presiding over the works in which were set forth the results of Andrés Bello's fruitful life of action and ceaseless labor dedicated to the unselfish ends of civilization and education and to the advancement of the various branches of human knowledge.

In preparing his *Principles of the Law of Nations* for Spanish America he was greatly helped by the works of two notable American scholars: James Kent's *Commentaries on the Constitution* and Elliot's *Diplomatic Code*, and



he acknowledged his indebtedness to them in the foreword to the first edition, whose publication a century ago has been so kindly commemorated tonight. It is my great privilege to pay my respects to their honored memories.

Andrés Bello's name has been perpetuated in his adopted country and in the other nations of the Americas, and his memory enhanced through the years, doubtlessly, because such was the noble yearning of his soul, perhaps impressed by that beautiful thought of Goethe: "If I work on incessantly until my death, nature is bound to give me another form of existence when the present one can no longer sustain my spirit."

Free America is the child of civilization and of democratic ideals. Superior men, guided by the hope of a common fatherland, helped to liberate it. Their names symbolize glory and civic spirit and stand out as models of virtue for succeeding generations.

Washington, Bolivar, Miranda, Sucre, San Martin, O'Higgins, and the other heroes of the epic struggle for independence and whom we justly call Fathers of their countries, were founders of free nations which have played an important part in shaping the destinies of the modern world, and have thus reflected honor upon our continent. I have called the roll of their glorious names because their example still serves as an inspiration to the men who are working for a greater America, and to such institutions, as the American Society of International Law, which promote peace and foster feelings of kinship among the sister republics of this continent.

May I be allowed, in closing, to say that the honor you have paid to the memory of a man who was above all an exponent of the spiritual union of the new nationalities in the Americas, leaves a deep and lasting imprint in the heart of all who bear the name and carry the blood of Andrés Bello.

**THE TOASTMASTER.** Ladies and gentlemen, I should say as a further act of commemoration, that the American Institute of International Law has in preparation a memorial edition of the classic work of Andrés Bello on the law of nations. The first edition, published in 1832, was succeeded by a second and by a third, in which "*Derecho de Jentes*" was replaced by "*Derecho Internacional*," and I understand the distinguished author had in mind a further edition and had made notes for its revision. We hope that the illustrious Cuban publicist, Dr. Antonio Sánchez de Bustamante, member of the American Institute, as well as honorary member of the American Society of International Law, will utilize these notes in the preparation of what we believe will be considered as the standard edition of the classic contribution of Spanish America to international law.

Ladies and gentlemen, we are to bring this pleasant evening to a close with a North American speaker, a member of the House of Representatives for the past twenty years. Presidential elections have not shaken his majority, and the good State of Maryland, which understands a good thing when it sees it, keeps him in Congress, and not only keeps him in Congress, but enables him to make a career which is an honor to the State and useful

to the nation, for at the present moment the gentleman whom I shall presently introduce is chairman of the Committee on Foreign Affairs of the House of Representatives.

While it would be too much to say that Mr. Linthicum has had a hand in the independence of these United States—coming too late into the world, as it were—nevertheless he has furnished us with its national anthem. There has been a mighty struggle between *Yankee Doodle*, *Hail Columbia*, and *The Star Spangled Banner*, but Mr. Linthicum, insisting upon the *Star Spangled Banner*, the author of which was a distinguished citizen of Maryland, has caused the *Star Spangled Banner* to be designated officially by the Congress of the United States as the national anthem of these United States.

Mr. Linthicum will, however, not sing to you tonight: he will speak.

THE COMMITTEE ON FOREIGN AFFAIRS OF THE HOUSE OF REPRESENTATIVES  
AND THE TREATY-MAKING POWER

REMARKS OF HONORABLE J. CHARLES LINTHICUM

*Chairman of the Committee on Foreign Affairs*

Ladies and Gentlemen of the American Society of International Law:

In accepting your invitation to address you this evening on the subject of the share of the Committee on Foreign Affairs of the House of Representatives in the treaty-making power of the Government of the United States, I find it necessary at once to go back to fundamental law as the basis for discussion.

You recall, of course, the constitutional<sup>1</sup> provision that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur;" also<sup>2</sup> that the "Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

A cursory reading of the Constitution may seem to indicate that the House of Representatives has no share in the process of making treaties for the United States. The actual working of government, however, is but faintly foreshadowed by the letter of the Constitution, and the ramifications of treaties are many and intricate. The inseparable relation between treaties and constitutionally specified functions of the House of Representatives quickly became evident.

In actual practice, accordingly, the influence of the House of Representatives in the matter of maintaining international relations through treaties has always been one of real significance. It has also been one of increasing significance—doubtless due in the first place to the ever-increasing extent

<sup>1</sup> Art. II, Sec. 2, second paragraph.

<sup>2</sup> Art. VI, second paragraph.

and complexity of that part of the law of our land which is comprised of treaties, and perhaps, also, not unconnected with the fact that democracy has grown apace in this country and that the House of Representatives is the principal exponent of democracy in the governmental system of the United States.

The Committee on Foreign Affairs is, of course, merely the principal agency of the House of Representatives in dealing with treaty questions. A discussion of its influence upon treaty-making is consequently not to be differentiated from a discussion of the influence of the House itself. I should not, however, overlook the fact that this influence of the House actually results in part from functions and activities that it exercises through other committees; though, of course, questions that obviously and patently pertain to treaties are referred to the Committee on Foreign Affairs.

In undertaking to recount some of the more important of the functions of the House of Representatives which affect treaty-making, there should be mentioned, first, the immense importance of absolute good faith on its part in order that the provisions of treaties may be given force and effect. It is common for treaties to provide for the payment of money. Under the practice of our government,<sup>3</sup> the Secretary of the Treasury pays out money only when authorized to do so by statute law enacted by Congress. Accordingly, in order to give effect to this kind, as to certain other classes, of treaties, the Congress, including the House of Representatives, passes acts or joint resolutions.

I am happy to say that, so far as I have ever heard, there has been no instance in which the House of Representatives has failed to take action when such action was necessary in order to fulfill the treaty obligations of the country.

In addition to the positive activity of the House thus exercised in order to give effect to certain treaties, it is essential that the House refrain from the passage of legislation that may be in conflict with the obligations of treaties. The Constitution, in one of the passages quoted above, lays down the rule that statutes and treaties, duly enacted or entered into, are equally the supreme law of the land. Accordingly, the Supreme Court<sup>4</sup> has held that, in the event of conflict, the later in date, whether statute or treaty, shall prevail.

I am sorry to say that the record of the House of Representatives in this matter is less perfect than in the case of the passage of necessary legislation, for there have been occasional instances, the result, usually, I dare say, of inadvertency, in which the House has joined the Senate in passing legislation which has forced the administrative officers of the government to violate the solemn obligations, and consequently the honor, of their country.

<sup>3</sup> In this connection, note Constitution, Art. I, Sec. 9, seventh paragraph. "No money shall be drawn from the Treasury, but in consequence of appropriations made by law."

<sup>4</sup> *Whitney v. Robertson* (1888), 124 U. S., 190, 194.

In both cases the influence of the House of Representatives, and its sense of national honor, may and do have a very great influence upon the actual practice of making and maintaining the treaties of the United States.

In view of the constitutional provision<sup>5</sup> that revenue legislation shall originate in the House of Representatives, a curious, and I think erroneous, doctrine, but one that is the subject of persistent and tenacious belief on the part of its advocates, exists to the effect that any treaty which may deal with the revenue of the country shall not be operative until it has been confirmed by statute, in the passage of which the House of Representatives shall join. Accordingly, when, in 1832, a treaty entered into force with France<sup>6</sup> containing provisions for reciprocal reductions in tariffs, the Congress took action,<sup>7</sup> somewhat belatedly, indeed, in order that statutory law should conform to the treaty provisions. Later reciprocity treaties of 1854 with Canada, of 1875 with Hawaii, and of 1902 with Cuba, specifically provided that they should not be binding until legislation had been enacted by Congress in confirmation of their provisions regulating tariff duties.<sup>8</sup>

Occasionally Congress has passed legislation specifically purporting to terminate treaties or portions of treaties. Thus the House of Representatives has taken part in what amounted, in a negative way, to treaty amendment, which amendment has not been the subject of the advice and consent of the Senate, two-thirds of those present concurring. For instance, in order to pave the way to reduced tariffs, and eventually to the free entry of sugar into the United States, the Tariff Act of 1913 undertook to abrogate a portion of the reciprocity treaty with Cuba.<sup>9</sup>

A more important and interesting practice that has grown up, however, is that of authorizing the President by means of a statute, passed in the ordinary way by the two Houses of Congress, to enter into agreements with other countries, which agreements are not submitted to the Senate as are treaties. Nevertheless, these executive agreements, from the point of view of international law and international obligations, are precisely the same as treaties, though different in name and in the fact that they are usually, though not always, confined to matters of economic or technical relations.

In 1872<sup>10</sup> the Congress passed an act authorizing the Postmaster

<sup>5</sup> Art. 1, Sec. 7.

<sup>6</sup> Art. VII of treaty signed July 4, 1831; operative, on exchange of ratifications, Feb. 2, 1832.

<sup>7</sup> Act of July 14, 1832, Sec. 2, paragraph 23.

<sup>8</sup> Treaty between the United States and Great Britain, signed June 5, 1854, ratifications exchanged Sept. 9, 1854, Arts. III, V; Act of Aug. 5, 1854. Treaty between the United States and Hawaii, signed Jan. 30, 1875, ratifications exchanged June 3, 1875, especially Art. V; Act of Aug. 15, 1876. Treaty between the United States and Cuba, signed Dec. 11, 1902, ratifications exchanged March 31, 1903, especially Art. XI; Act of Dec. 17, 1903.

<sup>9</sup> Act of Oct. 3, 1913, Sec. IV, paragraph B, referring to proviso to Art. VIII of treaty. The free sugar provision of the Act was, however, repealed before it became operative; Act of April 27, 1916.

<sup>10</sup> Act of June 8, 1872, Sec. 167, *Sec. U. S. v. Eighteen Packages* (1914), 222 Fed., 121.

General, subject to ratification by the President, to enter into agreements for the purpose of maintaining the international postal service. Under this provision of law the United States has, without submission to the Senate, become party not only to numerous bipartite agreements with other countries, but to the successive revisions of the general convention of the Universal Postal Union, which is among the most important of the great multipartite treaties that have enriched international legislation during the last two or three generations. The Universal Postal Union, by the way, is one of the oldest of the numerous leagues of nations now existing in the world, to a dozen or more of which the United States belongs. We entered the postal league of nations by action of the President, authorized by ordinary majorities in Congress, not by a vote of two-thirds of the Senate.

An even more striking instance of international agreement authorized by Congress is the manner of handling the inter-governmental debts which grew out of the World War. The international agreements under which beginnings have been made toward the discharge of these debts have been entered into and confirmed under action by the two houses of Congress, completely ignoring the rule of treaty-making with the consent of two-thirds of the Senate.<sup>11</sup>

The Tariff Acts of 1890 and 1897 authorized the President to enter into agreements affecting tariff rates, and consequently the revenue. Numerous such agreements were entered into and were put into force without submission to the Senate. The bill<sup>12</sup> introduced into the House of Representatives this year by Representative Collier, which was the basis of the tariff bill eventually passed by the House of Representatives, authorized the President to enter into reciprocal agreements and made no mention of submission to the Senate.

In order to escape the possible question whether a treaty which amends on a large scale statutory enactments is, in constitutional law, self-executing, as well as to avoid the policy of amending statutes by treaty, the practice has developed for the President, if he proposes that the United States shall become party to multipartite or other conventions that are out of accord with existing statutes, to undertake to have the statute law made consistent prior to participation in the treaties. An excellent case in point is the International Convention for the Protection of Literary and Artistic Works. The President has transmitted this convention to the Senate, but only subsequent to the passage by the House of Representatives of a bill<sup>13</sup> designed to amend the copyright law so as to make it conform with the treaty. The Committee on Foreign Relations of the Senate, acting under the advice of the Department of State, in favorably reporting this treaty,

<sup>11</sup> Act of Feb. 9, 1922, and various joint resolutions confirmatory of individual agreements. Act of Feb. 14, 1929.

<sup>12</sup> H. R. 6662, 72nd Congress, 1st Session.    <sup>13</sup> H. R. 12549, 71st Congress, 3d Session.

instructed its chairman not to bring it before the Senate until after the pending legislation had passed.

In these instances the influence and importance of the House of Representatives in treaty-making becomes increasingly apparent.

Perhaps, however, the most notable instances of what to all intents and purposes was treaty-making shared in by the House of Representatives have occurred in cases where results ordinarily accomplished by treaty were done by act or joint resolution in order deliberately to avoid the stipulation of the Constitution that the Senate shall proceed in such matters by a two-thirds vote.

Thus, in 1845, after the Senate had failed to give its assent to a treaty concluded with Texas for its annexation to the United States, Congress adopted joint resolutions declaring that it consented "that the territory properly included within, and rightfully belonging to, the Republic of Texas" might be erected into a new State, and admitting that State into the Union.<sup>14</sup> The Senate majority in favor of annexation was far less than two-thirds.

In 1911, a somewhat similar instance occurred when President Taft arranged with the Canadian authorities for the reciprocal reduction of tariff duties so soon as the legislatures of each country should have passed concurring legislation. The Congress of the United States passed such an act,<sup>15</sup> and what would to all intents and purposes have been a reciprocity treaty failed only because of the adverse attitude of the Canadian Parliament.

After the failure of the Treaty of Versailles in the Senate, moreover, the Congress undertook to terminate the state of war between the United States and Germany and Austria, by means of a joint resolution,<sup>16</sup> which resolution was afterwards recognized in the treaties of peace<sup>17</sup> entered into with those two countries.

The fact that Congress enacted this legislation suggests pertinently the belief of many that the provisions of the Constitution requiring two-thirds of the Senate to pass affirmatively on a treaty should be abrogated and a provision inserted that treaties may be enacted by a majority vote in the two houses of Congress in the same way that statutes are enacted.

Moreover, in view of the fact that, regardless of legislation in conflict with treaties or failure to pass legislation necessary to fulfill the obligations of treaties, international law recognizes the treaties as unimpaired, which rule of international law was clearly stated by a former President and later Chief Justice of the United States in a recent arbitration case,<sup>18</sup> it would seem to be desirable to provide in the Constitution that legislation in conflict with

<sup>14</sup> Moore, *International Law Digest*, V, 778-779. Resolutions of March 1 and Dec. 29, 1845.

<sup>15</sup> Act of July 26, 1911.

<sup>16</sup> Resolution of July 2, 1921.

<sup>17</sup> Treaties of Aug. 25, 1921, and Aug. 24, 1921.

<sup>18</sup> Taft, sole arbiter between Great Britain and Costa Rica, 1923, *Am. Jour. Int. Law*, Jan. 1924, p. 160.



the solemn obligations of the United States expressed in treaties, should be null and void.

That the two-thirds rule is out of date is persuasively shown by the fact that, with the multiplicity and variety of Senatorial constituencies, it is not only now possible for a very small minority, representing far fewer than one-third of the people of the country, to prevent the ratification of treaties desired by the majority, but also for a minority, representing two-thirds of the States, the smaller ones, to consent to treaties that are opposed by the representatives of the majority of the people.

Dissatisfaction with minority rule in the matter of treaty-making is, furthermore, doubtless in part the reason back of the growing practice of entering into international engagements by means of executive agreements, quite regardless of legislative authorization.

In the early days, the executive was exceedingly chary of practices of this sort. President Monroe, indeed, after sanctioning the exchange of notes<sup>19</sup> between his Acting Secretary of State, Benjamin Rush, and Charles Bagot, Minister of Great Britain, by means of which the two countries entered into the famous agreement limiting naval armaments on the Great Lakes, became uncertain as to the propriety of what he had done and submitted the agreement to the Senate<sup>20</sup> for confirmation in the same manner as treaties. Of late years, however, Presidents have, without ever consulting the Senate, entered into numerous arrangements, some of them of the highest political importance, by executive action merely.

The constitutional status of the executive agreement has never been defined. As the constitutional authority for carrying on international relations, the President doubtless has the power to enter into international contractual arrangements, other than those intended to be covered by the word "treaty"—a power presumably not unforeseen by the makers of the Constitution. The practice as it exists, however, is a questionable one and could hardly be justified were it possible for the executive, acting with ordinary majorities of the two Houses of Congress, to enact international agreements with at least as much certainty and dispatch as in the case of statutes.

Probably no case on record has shown the evils of minority dominance in the matter of treaty-making so glaringly as has the handling of the Protocol of the Permanent Court of International Justice.

This protocol was first submitted to the Senate by President Harding and Secretary Hughes in 1923. In 1925 the House of Representatives passed a resolution favoring the participation of the United States in the court. In 1926 the Senate approved the protocol, with reservations. Since that time the entire issue has become more and more clouded and at present it is probably impossible for any one to understand or define the situation, so far as the United States is concerned, *vis-à-vis* a treaty which is at once

<sup>19</sup> Signed April 28-29, 1817.

<sup>20</sup> Consent given April 16, 1818.

among the most vital for the promotion of peace and least binding in positive obligations that has ever been added to the world's international law.

For many years, there has been every reason to believe that the majority of the people of the United States, who have any opinion in the matter, approve the ratification by this country of the protocol of the World Court. The protocol of 1920, and the two subsequent protocols now also before the Senate, have not been ratified. It is an interesting fact in connection with them, however, that the only affirmative requirement on the part of the United States, should these protocols be ratified, in order to carry out their obligations, would be the annual payment of a small sum of money, certainly less than \$60,000.

Since this is the case, and since it is believed that a large majority of both Houses of Congress are in favor of the actual participation of the United States in the World Court, it is interesting to note that, as a practical matter, the United States can do so whenever these majorities are ready to go through the process of appropriating the amount of money involved.

While there appears to be agreement that the amount of the contribution of the United States may be determined by Congress, the appropriation actually made would certainly be no less than the largest contribution now made by a single country. The paralysis of Senatorial procedure would seem to call for some action by Congress as a whole without waiting for the two-thirds senatorial majority. The court goes on with its work from year to year, and it has had throughout its life the collaboration of an eminent American as one of the judges. The American members of the Permanent Court of Arbitration now participate in the choice of judges of the World Court by nominating candidates for election. At the present time, without any action whatever by the United States, the Court is open to the United States for the decision of any controversies that it may agree with other countries to refer to the court.

The United States has all the benefits of the court's existence, yet the entire expense of the court, even the salary of the American judge, is paid by the taxpayers of other lands. There is no reason whatever why we should not pay our share of the expense of an institution of which we have the benefit. Action to this end could and should be initiated by the House of Representatives. All that is required is that a small sum of money should be appropriated for the expenses of the court each year; we should by paying it be doing everything that we should be obliged to do if the protocols were ratified. Many precedents for such action exist in the frequent appropriations by Congress for the American share of the expenses of international institutions and of international conferences held in recent years at Geneva and elsewhere.

The President has undoubted authority, furthermore, to enter into negotiations to the end that, when judges of the court are being chosen representatives of the United States may be present and vote, thus en-

abling the United States to exercise the privilege of taking part in the elections.

The final result is that by action of the Congress apart from agreement by two-thirds of the Senate, the United States may practically—and this is a practical world—give its support just as effectively to the World Court, and indeed, be essentially as much a part of the court, as though the deadlock in the Senate had been broken and advice and consent to the ratification of the protocols, without further reservation or amendment, had been granted.

Compared with precedents, this would be a fairly mild adventure in leadership by the House of Representatives in the field of international relations. I am convinced that the matter is one that ought to be considered by the American Society of International Law, just as I hope that it may soon be considered in Congress.

Constitutional forms and conventions are never fixed and immutable. There has been a progressive development under the Constitution in the handling of international affairs by the two houses of Congress, and the democratic trend in international affairs in the period since the World War makes it inevitable that this development shall continue in the future.

The TOASTMASTER. Ladies and gentlemen, I am sure I interpret your desires when I extend to the speakers of the evening our heartfelt appreciation of their presence and of the courtesy which they have done us in attending and instructing us. With a further word, we shall adjourn.

You will observe on the program that Mr. Roland Morris was to have attended as guest of honor and to have spoken. At the very last moment he was unable to appear because a very important case in which he was retained was set for trial on Monday next. So important it was that he felt he could not attend, lest he might have appeared unprepared for the legal ordeal.

Thanking you, ladies and gentlemen, I bid you, if I may, an affectionate good bye.

## MINUTES OF THE EXECUTIVE COUNCIL

Thursday, April 28, 1932

The Executive Council of the American Society of International Law met at No. 700 Jackson Place, N. W., Washington, D. C., on Thursday, April 28, 1932, at 3.00 o'clock p.m., under the presidency of Dr. JAMES BROWN SCOTT, President of the Society.

### Present:

CHANDLER P. ANDERSON	FRED K. NIELSEN
CHARLES HENRY BUTLER	PITMAN B. POTTER
KENNETH W. COLEGROVE	WILLIAM J. PRICE
FREDERIC R. COUDERT	JESSE S. REEVES
WILLIAM C. DENNIS	JAMES BROWN SCOTT, <i>President</i>
CLYDE EAGLETON	ELLERY C. STOWELL
CHARLES G. FENWICK	GEORGE GRAFTON WILSON
GEORGE A. FINCH, <i>Secretary</i>	ROBERT R. WILSON
JAMES W. GARNER	LESTER H. WOOLSEY, <i>Treasurer</i>
HENRY B. HAZARD	HERBERT WRIGHT
ARTHUR K. KUHN	QUINCY WRIGHT

The Council arose and stood out of respect to the memory of Dr. David Jayne Hill, a member, who died on March 2, 1932. Upon motion duly made and seconded, the SECRETARY was directed to transmit to the family of Dr. Hill an expression of the respect and sympathy of the Council.

The SECRETARY was likewise directed to send an expression of the deep regret of the Council to Dr. Charles Noble Gregory for the grave illness which prevented his presence at the meeting, and to Mr. Howard Thayer Kingsbury, whose illness also prevented his attendance at the meeting.

The reading of the minutes of April 23 and April 25, 1931, which had been printed in the volume of *Annual Proceedings*, was dispensed with, and they were approved as printed.

The SECRETARY reported the receipt of an invitation from the *Université de Caen* to the Society to be represented at the celebration of the fifth centenary of the University June 11-13, 1932. Upon motion, duly made and seconded, M. Henri Fromageot, an honorary member of the Society, was designated to represent it at the celebration, with power in the President to appoint an alternate.

An improved form of notice of election to membership in the Society was submitted by the SECRETARY and met with the general approval of the members of the Council.

The following report on the membership of the Society was made by the SECRETARY:

Membership at date of last report, April 23, 1931:	
Honorary members .....	7
Life members .....	29
Annual members .....	1,246
	<hr/> 1,282
New members since last report:	
Honorary .....	1
Life .....	1
Annual .....	75
	<hr/> 77
Reinstatements .....	3
	<hr/> 80
	<hr/> 1,362
Losses of membership since last report:	
Resigned .....	83
Deceased .....	23
Dropped .....	81
	<hr/> 187
Present membership .....	<hr/> 1,175
Net loss since last report .....	107

The SECRETARY reported that he had conducted the correspondence and kept the files and records of the Society; had performed the duties of Managing Editor of the *American Journal of International Law*, and attended to its mailing to the members. He also looked after the subscriptions to the *Journal*, and edited and published the volume of *Annual Proceedings* of the Society, which for 1931 contains 381 pages, including an appendix of documents relating to the adherence of the United States to the Permanent Court of International Justice.

Subscriptions to the *American Journal of International Law* were reported by the SECRETARY as follows:

Subscriptions reported April 23, 1931 .....	1,080
Subscriptions cancelled since then .....	106
New subscriptions since last report .....	118
	<hr/> 12
Net gain .....	<hr/> 12
Total subscriptions April 28, 1932 .....	1,092

The TREASURER submitted his report for the year ended December 31, 1931, accompanied by a report by Messrs. Price, Waterhouse & Co., certified public accountants. The figures were explained in detail by the Treasurer

and showed the Society to be in satisfactory financial condition. The reports of the Treasurer and auditors were thereupon received, approved, and ordered to be filed.<sup>1</sup>

The EDITOR-IN-CHIEF of the *American Journal of International Law* submitted the four numbers of the *Journal* which had been published since the last meeting of the Council, and a detailed written report on the work of each member of the Board of Editors. He stated that every editor had cordially coöperated and not a single instance had occurred where work requested of the editors had not been done and at the time requested. He called attention to the Supplements for 1932 containing the draft conventions and comments of the Harvard Research in International Law, which are the joint work of the Research and the members of the Society, and are being published with the financial aid of the Research and the Carnegie Endowment for International Peace. The report of the Editor-in-Chief was accepted, approved, and ordered to be filed.

For the Committee on Selection of Honorary Members, Mr. STOWELL, Chairman, reported the name of M. Charles Dupuis, Director of the *École Libre des Sciences Politiques*, and, after consideration, the recommendation of the Committee was approved by the Council and the Chairman was authorized to report the name of M. Dupuis to the Society for election to honorary membership for the year 1932.

In the absence of the Chairman of the Committee on Increase of Membership, the SECRETARY reported that during the year invitations to join the Society had been sent to all teachers of international law and international relations in the United States not already members, and also to all foreign consular officers in the United States calling especial attention to the supplements containing draft conventions and comments on diplomatic privileges and immunities and the legal position and functions of consuls. From these special invitations and from applicants recommended by individual members of the Society, 75 new members had been added to the rolls since the last meeting of the Council. The SECRETARY also reported that during the year special descriptive literature had been prepared and sent to several hundred libraries in the United States and foreign countries, from which most of the new subscriptions previously reported had been received. It was suggested by the Council that a special effort should be made to enroll graduate students and members of the committees on international law of the several bar associations.

The Chairman of the Committee on Annual Meeting laid before the Council the program of the 26th annual meeting, and expressed appreciation of the coöperation of the members of the Committee who by personal attendance at its meeting or by letter had assisted in arranging the subjects and speakers. He reported that Mr. E. T. Williams was unable to be present to read his paper, and upon motion, duly made and seconded, Professor Cole-

<sup>1</sup>The Treasurer's report is reprinted herein, p. 262.



grove was requested to prepare and read a summary of Mr. Williams' paper, which, however, was to be printed in full in the *Proceedings*.

The Chairman of the Committee on Codification of International Law made an oral report of progress. He stated that the initiative in the continuation of the work of codification undertaken by the League of Nations has been transferred to the individual states, and nothing has been done. In the Western Hemisphere, a number of important items of codification have been placed on the agenda of the Seventh Pan American Conference scheduled to be held at Montevideo in 1932. In the United States the work started in 1929 by the Harvard Research in International Law has been continued. Four draft conventions and comments, dealing with diplomatic privileges and immunities, legal position and functions of consuls, competence of courts in regard to foreign states, and piracy, have been completed this year, and three new topics undertaken for the third phase of the work, which is being done according to a special technique developed by the Advisory Committee of the Research. All members of the Society's Committee on Codification are members of the Advisory Committee. The tie of the Society to this work is through the publication of the draft conventions and comments of the Harvard Research in International Law in the Supplements to the *American Journal of International Law*. The report of the Chairman was received, and he was authorized to make the report of progress to the Society at its business meeting on April 30th.

Professor GARNER called attention to the presentation by a committee of the Society to the Secretary of State (see *Proceedings* for 1931, pp. 185-186) of the resolution adopted by the Society on April 25, 1931, expressing the hope that the Government of the United States would send an encouraging reply to the letter of the Secretary General of the League of Nations regarding the continuation of the work of codifying international law begun by the Hague Conference of 1930. Professor GARNER stated he understood that the Secretary of State had sent a favorable reply to the League of Nations.

Professor GEORGE GRAFTON WILSON stated that while heretofore the funds for carrying on the work of the Harvard Research in International Law had come from sources outside of Harvard University, the funds for this year were from the Bureau of International Research of Harvard University and Radcliffe College.

In reply to a query from Mr. Herbert Wright, the SECRETARY called attention to the resolution adopted by the Council on April 25, 1931, in regard to publications of the Department of State. He reported that so far nothing had been done with the resolution, and he expressed the fear that the appropriation for such publications might suffer in the reduction of governmental expenses by Congress. Upon motion, duly made and carried, the resolution was referred to the incoming Council.

Professor REEVES called attention to the first volume of the new

edition of *Treaties of the United States* published by the Department of State, and after discussion he was authorized to present a resolution to the Society commending the volume and expressing the hope that the series will be continued.

There being no further business, the meeting adjourned at 5.50 o'clock p.m.

GEORGE A. FINCH,  
*Secretary*

Approved:  
JAMES BROWN SCOTT,  
*President*

**TREASURER'S REPORT**  
**January 1 to December 31, 1931**  
**INVESTMENT ACCOUNT**

**ON HAND JANUARY 1, 1931:**

Cash on deposit with Union Trust Co. ....	\$84.90	
\$6,000 Cuba Northern Railways, 5½s (cost price) .....	5,914.58	
\$1,000 Argentine Government, 5½s (cost price) .....	972.90	
\$2,000 Australian, 4½s (cost price) .....	1,853.75	
\$500 Associated Gas and Electric 5s (cost price) .....	457.01	
\$500 Illinois Power and Light Corp. 5s (cost price) .....	480.28	
<b>Totals</b> .....		<b>\$9,763.42</b>

**TRANSACTIONS DURING THE YEAR 1931:**

	<i>Receipts</i>	<i>Disbursements</i>
Jan. 1. Cash on hand at Union Trust Co. ....	\$84.90	
Jan. 31. Interest on Union Trust Co. deposit .....	5.31	
Feb. 25. Life membership (Mr. M. C. Sloss) .....	100.00	
Mar. 3. Interest on Union Trust Co. deposit put in Business Account .....		\$5.31
Apr. 4. Life Membership (Mr. George A. Finch) .....	100.00	
Jul. 31. Interest on Union Trust Co. deposit .....	3.27	
Dec. 28. Interest on Union Trust Co. deposit put in Business Account .....		3.27
<b>Totals</b> .....	<b>\$293.48</b>	<b>\$8.58</b>

Balance on deposit in Union Trust Co., December 31, 1931. .... **\$284.90**

**SUMMARY**

Cash on hand January 1, 1931 .....	\$ 84.90
Two life memberships added during the year .....	200.00
Balance on deposit in Union Trust Co., December 31, 1931 .....	<b>\$284.90</b>

**BUSINESS ACCOUNT**

**RECEIPTS**

**January 1, 1931. Cash on hand:**

Riggs National Bank .....	\$182.76
Petty cash .....	10.00
	<b>\$192.76</b>

**Membership dues:**

1930 .....	\$117.50	
1931 .....	5,452.70	
1932 .....	141.75	
Back dues .....	10.00	
		<b>\$5,721.95</b>

**Subscriptions:**

1931 .....	\$2,166.75	
1932 .....	2,394.50	
		<b>4,561.25</b>

**Foreign postage** .....

**415.49**

**Proceedings sold:**

1930 .....	\$45.90	
1931 .....	1,654.05	
1932 .....	168.60	
		<b>1,868.55</b>

**Back numbers sold:**

Journals .....	\$448.45	
Proceedings .....	134.40	
		<b>582.85</b>

**Analytical Index sold** .....

**10.00**

## Interest on securities:

Cuba Northern Railways 5½s	\$330.00	
Argentine Government 5½s	55.00	
Australian 4½s	90.00	
Associated Gas and Electric 5s	25.00	
Illinois Power and Light Corp. 5s	25.00	
		\$525.00

## Interest on deposits:

Union Trust Company	\$8.58	
American Security and Trust Co.	28.07	
		36.65

Banquet tickets	990.00	
Binding Journals for members	50.00	
Special Supplement sales	18.30	
Exchange on foreign subscriptions	.44	
Extra off-prints paid for	15.25	
Refunds	1.95	
		\$14,797.68

\$14,797.68

Cash on hand Jan. 1, 1931 (\$192.76) and total receipts (\$14,797.68) December 31, 1931

\$14,990.44

## DISBURSEMENTS

## Salaries:

Managing Editor	\$2,400.00	
Clerks	1,020.00	
Assistant to Treasurer	480.00	
		\$3,900.00

## Journal:

Preparation	\$322.63	
Printing	5,933.69	
Mailing	389.95	
Off prints	212.67	
Miscellaneous	70.50	
		6,929.44

## Annual meeting:

Printing and postage	\$55.50	
Telegrams	4.76	
Reporting	210.00	
Banquet	1,036.75	
		1,307.01

## Proceedings:

Preparation	\$44.31	
Printing	1,636.71	
Off-prints	174.84	
Copyright fee	2.00	
Mailing	102.59	
		1,960.45

## Office expenses:

Stationery and postage	\$331.13	
Telegrams and cables	3.28	
Freight and Express	2.78	
Office supplies	23.10	
Binding	170.75	
Refunds	62.75	
Miscellaneous	170.93	
		764.72

## Back numbers:

Copies purchased	\$26.25	
Postage for distribution	47.09	
		73.34

Total disbursements

\$14,934.96

## SUMMARY

Total receipts during the year 1931 .....	\$14,797.68
Total disbursements during the year 1931 .....	14,934.96
Debit balance for the year 1931 .....	\$137.28
Beginning balance January 1, 1931 (including cash on hand) .....	192.76
Balance .....	\$55.48
Balance on deposit in American Security and Trust Co., January 1, 1932 .....	\$45.48
Petty cash .....	10.00
Total .....	\$55.48

## ASSETS

Investments:		
\$6,000 Cuba Northern Railways 5½s at 98½ (cost price) ..	\$5,914.58	
\$1,000 Argentine Government 5½s at 97 -(cost price) ....	972.90	
\$2,000 Australian 4½s at 92½ (cost price) .....	1,853.75	
\$500 Associated Gas and Electric 5s at 91 (cost price) ....	457.01	
\$500 Illinois Power & Light Corporation 5s at 95½ (cost price) .....	480.28	
		\$9,678.52
Cash:		
Union Trust Company (Investment Account) .....	\$284.90	
American Security and Trust Company (Business Account)	45.48	
Petty cash .....	10.00	
		340.38
Accounts receivable:		
Unpaid dues .....		405.00
		\$10,423.90

## LIABILITIES

Accounts payable .....	None.	
1932 Membership dues paid in 1931 .....	\$141.75	
1932 Subscription fees paid in 1931 .....	2,394.50	
1932 Proceedings paid for in 1931 .....	168.60	
Balance of Treaty Series, League of Nations fund .....	120.52	2,825.37
Excess of assets over liabilities .....		\$7,698.53

Respectfully submitted,

LESTER H. WOOLSEY,  
Treasurer

## MINUTES OF THE EXECUTIVE COUNCIL

Saturday, April 30, 1932

The Executive Council of the American Society of International Law met in the Willard Room of the Willard Hotel, in Washington, D. C., on Saturday, April 30, 1932, at 12 o'clock noon. The President of the Society, Dr. James Brown Scott, presided. Upon roll call by the Secretary, the following members responded present:

HOLLIS R. BAILEY  
CHARLES HENRY BUTLER  
KENNETH W. COLEGROVE  
WILLIAM C. DENNIS  
GEORGE A. FINCH  
JAMES W. GARNER  
HENRY B. HAZARD  
MANLEY O. HUDSON  
ARTHUR K. KUHN

PITMAN B. POTTER  
HAROLD S. QUIGLEY  
JESSE S. REEVES  
JAMES BROWN SCOTT  
ELLERY C. STOWELL  
GEORGE T. WEITZEL  
GEORGE GRAFTON WILSON  
HERBERT WRIGHT  
QUINCY WRIGHT

The following officers were nominated for reelection, and there being no other nominations, the Secretary, upon motion duly made and seconded, was instructed to cast a single ballot for each of the nominees:

CHARLES HENRY BUTLER, *Chairman of the Executive Council*  
GEORGE A. FINCH, *Secretary*  
LESTER H. WOOLSEY, *Treasurer*

The Secretary reported that he had cast the ballots, and the President declared each of the nominees duly elected to the office for which he was nominated.

The following members were then duly elected to the Executive Committee:

CHARLES HENRY BUTLER, *Chairman, ex officio*  
CHANDLER P. ANDERSON  
WILLIAM C. DENNIS  
GEORGE A. FINCH, *ex officio*  
CHARLES NOBLE GREGORY  
MANLEY O. HUDSON  
ROLAND S. MORRIS  
GEORGE T. WEITZEL  
GEORGE GRAFTON WILSON  
LESTER H. WOOLSEY, *ex officio*  
HERBERT WRIGHT  
QUINCY WRIGHT

Mr. WILSON made an oral report on the work of the members of the Board of Editors of the *American Journal of International Law* during the preceding year. He referred to the written report on the work of each editor submitted by him to the Executive Council at its meeting two days before on April 28th, and the four issues of the *Journal* published during the year. He stated that each member of the Board had cooperated in hearty fashion, and he recommended that the Board be continued as constituted.



Mr. HUDSON thought that the Editor-in-Chief should submit a written report to this meeting of the Council. Mr. BUTLER objected, stating that the report was properly submitted to the members of the outgoing Council at its last meeting and there was nothing to report to the new members of the Council at the present meeting.

As the result of the ensuing discussion, it was moved, seconded, and carried, that the Secretary communicate to the first meeting of the new Council the recommendations submitted with the report to the outgoing Council by the Editor-in-Chief. Whereupon the following members were duly reelected to the Board of Editors:

GEORGE GRAFTON WILSON, *Editor-in-Chief*

GEORGE A. FINCH, <i>Managing Editor</i>	CHARLES CHENEY HYDE
CHANDLER P. ANDERSON	PHILIP C. JESSUP
EDWIN M. BORCHARD	ARTHUR K. KUHN
PHILIP MARSHALL BROWN	PITMAN B. POTTER
EDWIN D. DICKINSON	JESSE S. REEVES
CHARLES G. FENWICK	ELLERY C. STOWELL
JAMES W. GARNER	LESTER H. WOOLSEY
MANLEY O. HUDSON	QUINCY WRIGHT

The following members were then elected to the Committee on Selection of Honorary Members: ELLERY C. STOWELL, Chairman; CHARLES CHENEY HYDE, JESSE S. REEVES.

Mr. HOLLIS R. BAILEY was elected Chairman of the Committee on Increase of Membership, and a motion was adopted authorizing the President to appoint the other members of that committee, as well as the members of the Committee on Annual Meeting. The Standing Committee on Codification of International Law was continued as at present constituted.

The question of the practicability of the Society meeting with the American Law Institute was discussed and referred to the Executive Committee.

A proposal to increase the number of Honorary Vice Presidents was also considered with a view of making places for some of the older members who are continuing their active interest in the Society. The proposal was referred to the Executive Committee with the suggestion of re-forming the present number of Honorary Vice Presidents.

There being no further business, the Executive Council adjourned at 1.15 o'clock *sine die*.

GEORGE A. FINCH,  
*Secretary*

Approved:  
JAMES BROWN SCOTT,  
*President*

**LIST OF MEMBERS**  
of the  
**AMERICAN SOCIETY OF INTERNATIONAL LAW \***

**HONORARY MEMBERS**

Adatei, Mineitcero, Badhuisweg 173, The Hague, Holland.  
Anzilotti, Dionisio, President, The Permanent Court of International Justice, The Hague, Holland.  
de Bustamante, Antonio S., Perfecto Lacoste, Apartado 134, Habana, Cuba.  
Dupuis, Charles A. M., 118, rue du Bac, Paris, France.  
Fromageot, Henri, 1, rue de Villersexel, Paris, France.  
Huber, Max, Ossingen, Canton of Zurich, Switzerland.  
Lyon-Caen, Charles, 13, rue Soufflot, Paris, France.  
Rolin, Alberic, Avenue Moliere 236, Brussels, Belgium.  
Simons, Walter, Zietenstr. 35a, Berlin-Dahlem, Germany.

**LIFE MEMBERS**

Anderson, Luis, San Jose, Costa Rica.  
Balch, Thomas W., 4300 St. Paul Street, Baltimore, Md.  
Berrien, Laura M., 900 19th Street, N. W., Washington, D. C.  
Calonder, Felix, President de la Commission Mixte, de Haute Silesie, Katowice, Poland.  
Carvajal, Henriquez, Santiago, Cuba.  
Chang, Ziang-ling, 3320 Point Road, Shanghai, China.  
Coudert, Frederic R., Jr., 2 Rector Street, New York City.  
Esty, Robert Pegram, 123 South Broad Street, Philadelphia, Pa.  
Finch, George A., 100 Virgilia Street, Chevy Chase, Md.  
Greene, Jerome D., 37 Broad Street, New York City.  
Gutierrez, Gustavo, Obispo No. 89, Habana, Cuba.  
Johnson, Alba B., 605 Morris Building, Philadelphia, Pennsylvania.  
Kodera, Kenkichi, 3 Nakayamatedori-Gochome, Kobe, Japan.  
Koo, V. K. Wellington, c/o Minister of Foreign Affairs, Peking, China.  
Marburg, Charles L., 14 W. Mount Vernon Place, Baltimore, Md.  
Meyer, C., 1427 Perry Place, N. W., Washington, D. C.  
Pardo, Felipe, c/o Peruvian Legation, Washington, D. C.  
Paul, Alice, Moorestown, N. J.  
Peaslee, Amos J., 501 Fifth Avenue, New York City.  
Portela, Epifanio, Argentine Legation, Rome, Italy.  
Sammons, Thomas, 536 Deming Place, Chicago, Ill.  
Scott, James Brown, 700 Jackson Place, Washington, D. C.  
Sloss, M. C., Hunter-Dulin Building, San Francisco, Calif.  
Stevens, Doris, Croton-on-Hudson, N. Y.  
Warner, James Harold, Calle Espiritu Santo No. 2, Mexico, D. F., Mexico.  
Wilson, Burton W., 285 Madison Avenue, New York City.

**ANNUAL MEMBERS**

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